Supreme Court of the United States

No. 707 OCTOBER TERM, 1941.

LEWIS J. VALENTINE, individually and as Police Commissioner of The City of New York,

Petitioner,

against

F. J. CHRESTENSEN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

May the City of New York prohibit the street distribution of "commercial and business advertising matter" without impairing the right of freedom of the press in violation of the First and Fourteenth Amendments to the Constitution, or the due process clause of the Fourteenth Amendment? If it may, is a regulation to that effect unconstitutional when applied to a commercial handbill to which there has gratuitously been added a protest against certain action of the City authorities? Two questions of first impression which are of importance to municipalities throughout the country.

October 20, 1941.

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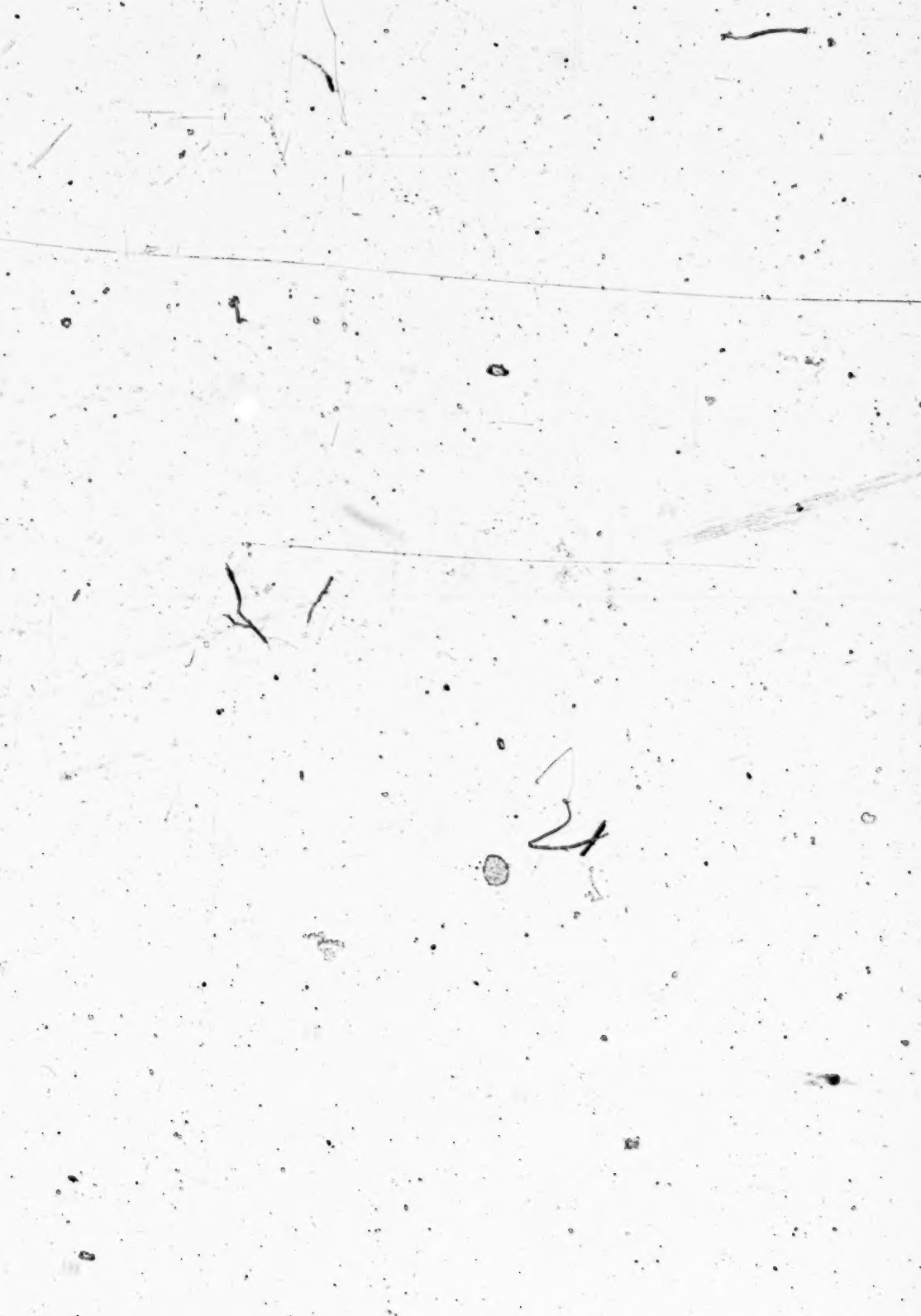

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of Lewis J. Valentine, individually and as Police Commissioner of the City of New York, respectfully shows:

1. As Police Commissioner of the City of New York your petitioner is charged by law with the enforcement of § 318 of the Sanitary Code of the City of New York, which provides as follows:

> "*Handbills, cards and circulars.*—No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letterbox therein; provided that nothing herein con-

tained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. *This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter.*" (Italics ours.)

2. F. J. Chrestensen is the owner and exhibitor for profit of the former United States Navy Submarine S-49. In the latter part of June, 1940, when the S-49 was on exhibition at Pier 5 on the East River, New York City, Chrestensen prepared and printed a handbill describing the submarine's attractions and soliciting public patronage (R. 26). This handbill is hereinafter referred to as handbill No. 1.

3. Chrestensen was advised by your petitioner that the distribution of handbill No. 1 on the public streets of the City would violate the above-quoted § 318 of the Sanitary Code, which prohibits such distribution of "commercial and business advertising matter." Chrestensen was further advised, however, that he was free to distribute handbills devoted solely to "information or public protest".

4. Chrestensen thereupon prepared, and exhibited to your petitioner in proof form, a double-faced handbill (R. 24-25). Its face was a revision of handbill No. 1, and it is stipulated that it contains nothing but commercial advertising matter. Its reverse side, it is stipulated, consists of a protest against the conduct of the Department of Docks of the City of New York in denying him certain wharfage facilities for the exhibition of his submarine, and is devoid of advertising matter. This second handbill is hereinafter called handbill A.

5. Before this double-faced handbill had been printed up in final form, Chrestensen was advised by your peti-

tioner that, while the protest appearing on its reverse side could be distributed without violating § 318 of the Sanitary Code, the entire handbill could not be distributed. Your petitioner further stated that action would be taken against Chrestensen under § 318 if he attempted to distribute handbill A, and your petitioner thus successfully prevented its distribution.

6. On July 22, 1940, Chrestensen instituted in the United States District Court for the Southern District of New York an action to enjoin your petitioner from interfering with the distribution of handbill A on the streets, sidewalks and other public places in The City of New York. Jurisdiction was alleged to exist under § 24(1) of the Judicial Code, the amount in controversy being said to be in excess of $3,000, and also under § 24(14) of the Judicial Code.

7. On August 26, 1940 the District Court granted Chrestensen's motion for an injunction *pendente lite*, holding § 318 invalid on its face (34 F. Supp. 596).

8. After a trial at which the facts were stipulated (R. 20-23), the District Court entered a final decree dated December 13, 1940 granting Chrestensen a permanent injunction against interference with the distribution of handbill A. The Court held that § 318 was unconstitutional and invalid as applied to the distribution by Chrestensen of handbills such as handbill A on all streets, sidewalks and public places in The City of New York that were not within the jurisdiction of the Commissioner of Parks. The decree further provided, however, that certain regulations issued by the Commissioner of Parks were constitutional and valid in so far as they prohibited the distribution of such handbills in those public places which were under the jurisdiction of the Park Commissioner.

9. Chrestensen did not appeal from the last-mentioned part of the decree, and it can therefore be disregarded.

However, your petitioner promptly appealed from that part of the decree which restrained him from acting under § 318 of the Sanitary Code to prevent the distribution of this handbill on the city streets.

10. On July 25, 1941 the Circuit Court of Appeals affirmed the District Court (122 F. [2d] 511).* CLARK, J., with whom SWAN, J., concurred, wrote the prevailing opinion. FRANK, J., wrote a dissenting opinion.

Jurisdiction and Timeliness.

11. This petition is submitted under U. S. Code, tit. 28, § 347, subdivision (a), and the Court has jurisdiction to grant the writ.

12. Since the decision of the Circuit Court was handed down on July 25, 1941 and the order of affirmance was entered on August 19, 1941, the petition is timely.

13. The record remains in the custody of the Clerk of the United States Circuit Court of Appeals.

The Opinions Below.

14. In its opinion granting Chrestensen's motion for an injunction *pendente lite*, the District Court held § 318 entirely invalid and unconstitutional, relying primarily upon *Lovell* v. *Griffin*, 303 U. S. 444 (1938) and *Schneider* v. *State*, 308 U. S. 147 (1939). When the final decree was entered, however, the District Court did not go so far. Instead of holding § 318 invalid on its face, the Court made a finding that, in so far as § 318 prohibited the distribution of handbills such as handbill A, it abridged the freedom of the press secured by the First and Fourteenth

* The issue of the advance sheets containing the report of this case was not out when this petition and brief were prepared. We will therefore be unable to refer to specific page numbers when quoting the opinions in the Circuit Court.

Amendments to the Constitution of the United States, and constituted a deprivation of property without due process of law in violation of the Fourteenth Amendment to that Constitution.

15. Judge CLARK, with whom Judge SWAN concurred when the Circuit Court of Appeals affirmed the District Court, likewise interpreted *Schneider* v. *State, supra,* as holding that a municipality could not prohibit the street distribution of purely commercial handbills. As to this he said:

> "We think, therefore, that interpretation of the conclusions of the *Schneider* case is not doubtful. Absolute prohibition of expression 'in the market place' is illegal, not to be saved by any commercial taint attached to the expression; reasonable regulation of soliciting, not preventing freedom of expression, is permissible."

Judge CLARK then went on to discuss at some length the application to the hybrid handbill before him of the distinction that has been drawn by the New York Legislature and Courts between commercial and non-commercial handbills. On this aspect of the case, he rejected as uncertain and unreal your petitioner's argument that the nature of a particular hybrid handbill was to be judged by the circumstances out of which it came to be printed, its content and its purpose. And then, in conclusion, Judge CLARK stated the effect and scope of his decision as follows:

> "To avoid misunderstanding, perhaps we should say that, while absolute prohibition of commercial handbills seems to us of doubtful validity, yet we decide no more here than at least it cannot extend to a combined protest or advertising not shown to be a mere subterfuge."

16. Judge FRANK dissented from the majority's entire opinion. He concluded that it was apparent from the stipulated facts that Chrestensen's sole purpose in trying to

distribute handbill A was commercial, that there was no evidence of mixed motives on Chrestensen's part and that handbill A must therefore be considered a commercial circular. Judge FRANK likewise stated that, in his opinion, *Lovell* v. *Griffin, supra,* and *Schneider* v. *State, supra,* were not to be read as overruling earlier decisions of this Court, such as those connected with outdoor advertising and billboards, which are wholly inconsistent with the proposition that commercial advertisements are protected by the right of freedom of the press. On the contrary, Judge FRANK gave it as his opinion that the *Lovell* and *Schneider* cases referred only to "historic weapons in the defense of liberty" and "restrictions cutting off appropriate means through which, in a free society, the processes of popular rule may effectively function". Going on from there to consider as a question of first impression the City's power to prohibit the distribution of commercial handbills, Judge FRANK concluded that the right to disseminate opinions and informations that was guaranteed by the Constitution did not extend to commercial advertisements, and that the City's police power justified the adoption and enforcement of a regulation prohibiting the street distribution of commercial handbills such as Chrestensen's.

Summary Statement of the Matter Involved.

17. Section 318 of the Sanitary Code expressly declares that it applies only to "commercial and business advertising matter". The Courts of New York have consistently held that this regulation applies only to those advertisements which are intended to attract the attention and patronage of the public to enterprises entered into for pecuniary gain. Well before the *Lovell* and *Schneider* decisions, the New York Courts held that § 318 and its predecessor did not apply (1) to *non-commercial advertisements* (*i. e.*, advertisements of meetings held in furtherance of some political, social, economic or other move-

ment, irrespective of whether an admission is charged therefor), or (2) to *non-commercial literature* (*i. e.*, written matter calculated to communicate information or opinions on matters of public concern). Accordingly, there is squarely presented the question of whether a regulation that is carefully limited to *commercial advertisements* is constitutional; and the further question of whether, if such a regulation is constitutional, handbill A constitutes "commercial and business advertising matter".

This Court has never passed upon the question of whether the street distribution of *commercial* advertisements may be prohibited. To date the Court has merely held that the street distribution of *non*-commercial advertisements (such as an advertisement of a political meeting to which admission was charged) may not be prohibited. Your petitioner contends that the street distribution of commercial advertisements is in no way essential to a full and free exchange of information, ideas and opinions on matters of public concern; that the street distribution of commercial advertisements is not protected by the freedom of press that is secured by the First and Fourteenth Amendments to the Constitution; and that the street distribution of such advertisements may therefore be prohibited under the police power.

Your petitioner further contends that the question of whether a hybrid handbill is or is not a commercial advertisement depends upon the facts and circumstances of a particular case, and that the facts which have been stipulated in the instant case demonstrate that handbill A is unquestionably a commercial advertisement.

Questions Presented.

18. The questions presented are:

(a) Has this Court held, in the *Lovell, Schneider* or other cases, that a municipality may not pro-

hibit the street distribution of commercial advertisements?*

(b) May a municipality, in the exercise of its police power, prohibit the street distribution of commercial advertisements without violating the right of freedom of the press that is secured by the First and Fourteenth Amendments to the Constitution of the United States, and without violating the due process clause of the Fourteenth Amendment to the Constitution of the United States?

(c) Did the Circuit Court of Appeals correctly hold that handbill A is not (a) a commercial advertisement, or (b) "a mere subterfuge" which was devised in an effort to evade § 318 of the Sanitary Code?

(d) Did the Circuit Court of Appeals correctly hold that § 318 of the Sanitary Code is invalid and unconstitutional if applied to handbills such as handbill A?

Reasons for Allowance of Writ.

19. This case raises an important question of constitutional law which has not been decided by this Court, and which is of vital concern to municipalities throughout the country.

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* It should be kept in mind that the term "commercial advertisements", as used in this petition and its supporting brief, excludes all such advertisements as those which relate to books or circulars of a political, religious or social nature, or those which relate to public meetings devoted to subjects of general interest at which an admission may be charged. In short, the term "commercial advertisements" is here restricted to include only those advertisements which are circulated for purposes of private gain in connection with a purely commercial enterprise such as the exhibition for profit of a privately owned submarine.

20. The littering of streets which results from the street distribution of advertising handbills creates fire, flood, health and traffic hazards, and imposes a considerable burden, financially and otherwise, upon a municipality's street cleaning department. It is generally recognized that the only effective means of preventing the hazards and expense which result from the increasing use of handbills as a commercial advertising medium, is to attack the problem at its roots. That is, to prohibit the distribution of such handbills, rather than to attempt to enforce against the hundreds or thousands of persons who throw such handbills away an ordinance which prohibits the *casting away* of handbills rather than their *distribution*. The decision below denies a municipality the use of the only practical and effective weapon of which it may avail itself in an effort to solve this problem. Numerous inquiries and communications which your petitioner and his counsel have received from municipal law enforcement agencies throughout the country attest the fact that the decision below seriously hinders and embarrasses them in meeting a difficult problem.

21. In thus denying the City of New York the power to prohibit the street distribution of commercial advertisements, the Circuit Court of Appeals has unduly and unnecessarily restricted the exercise of the City's police power, and has disregarded applicable decisions of the New York Courts.

22. The Circuit Court of Appeals has disregarded and failed to apply earlier decisions of this Court relating to the prohibition and regulation of commercial advertising; has misinterpreted and extended beyond their true scope the decisions of this Court in *Lovell* v. *Griffin, supra,* page 4, *Schneider* v. *City, supra,* page 4, and *Hague* v. *C. I. O.*, 307 U. S. 496 (1939); and has misconstrued and extended beyond its true scope the right of freedom of the press that is secured by the First and Fourteenth Amendments to the Constitution of the United States.

23. In refusing to hold that the handbill before the Court constitutes "commercial and business advertising matter", the Circuit Court of Appeals has sanctioned an easy and simple method of evading municipal restrictions against the street distribution of commercial advertisements; has sanctioned the use of the bill of rights as a cloak to further private commercial ends; and has misinterpreted and misapplied the right of freedom of the press that is guaranteed by the Constitution.

24. Since the Circuit Court of Appeals has held Section 318 of the Sanitary Code unconstitutional in so far as it applies to handbills such as handbill A, your petitioner is informed and believes that he has a right to appeal to this Court under U. S. Code, tit. 28, § 347 (b). However, in an effort to make certain that all of the questions presented and disposed of below will be before this Court, your petitioner has determined to file this petition for a writ of certiorari in lieu of perfecting such an appeal.

WHEREFORE, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals for the Second Circuit in this case, being No. 358 on its calendar for the October Term, 1940, to the end that the case may be reviewed and determined in this Court, as provided in Title 28, Section 347 of the Code of Laws of the United States, and that the said final order of the said Circuit Court of Appeals for the Second Circuit in this case, and every part thereof, may be reviewed by this Court, and the determination of the said Circuit Court of Appeals for the Second Circuit, as well as the determination of the United States District Court for the Southern District of New York, which was affirmed by the

United States Circuit Court of Appeals for the Second Circuit, may be reversed and a mandate issued denying the plaintiff's prayer for relief and dismissing the complaint; and your petitioner prays for such other and further relief as to this Court may seem just and equitable; and your petitioner will ever pray.

New York, N. Y. October 20, 1941.

LEWIS J. VALENTINE, individually and as Police Commissioner of the City of New York, *Petitioner*,

By WILLIAM C. CHANLER,
Corporation Counsel of the City of New York,
Municipal Building,
New York, N. Y.

Supreme Court of the United States

No. . October Term, 1941.

Lewis J. Valentine, individually and as Police Commissioner of The City of New York,

Petitioner,

against

F. J. Chrestensen.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This case presents the question of whether a municipality may prohibit the street distribution of commercial handbills without interfering with the freedom of the press that is guaranteed by the First and Fourteenth Amendments to the Constitution. That important question of constitutional law has not yet been passed upon by this Court. Some day it must be, for it is vitally important to every municipality in the country to discover whether its police powers are such as to permit it to adopt this practical and effective means of solving the many problems which have arisen from the increasing use of handbills as a commercial advertising medium.

The Facts:

The material facts were stipulated at the trial (R. 20-23). As stipulated, they were found by the District Court (R. 10).

Chrestensen owns, and exhibits for profit, the former Navy submarine S-49. When he brought his submarine to

New York City in the late Spring of 1940, he sought permission from the City Dock Commissioner to exhibit it at a city-owned pier. This permission was denied him in accordance with an established city policy. He thereupon obtained the use of a nearby state-owned pier.

As a part of his campaign to attract patronage, Chrestensen prepared handbill No. 1, which described the submarine's attractions and solicited public patronage at certain stated prices (R. 26). When he attempted to have this handbill distributed on the City streets he was advised by the police authorities that its distribution would violate § 318 of the Sanitary Code for the reason that it constituted "commercial and business advertising matter" (R. 22).

Chrestensen thereupon prepared handbill A (R. 24-25). Although the face of that handbill differs in some respects from handbill No. 1, it is stipulated that its face contains commercial and business advertising matter and nothing else (R. 22). Its reverse side contains a protest against the action of the Dock Commissioner in denying him the use of a City-owned pier. It is stipulated that this reverse side does not contain commercial and business advertising matter, but a public protest (R. 22).

A printer's proof of handbill A was submitted to the police authorities (R. 23). Chrestensen was advised that a handbill consisting solely of the protest matter printed on its reverse side could be distributed without restraint (*ibid.*). He nevertheless went forward with his plans, had handbill A printed up as a single document, and as a result was restrained from distributing it by the police authorities (*ibid.*). This proceeding was then brought to enjoin the Police Commissioner from interfering with its distribution.

Three facts deserve special mention. First, Chrestensen made no attempt to prepare or distribute a protest against the Dock Commissioner until *after* he had been advised that he could not distribute a straight commercial handbill such as handbill No. 1. Second, Chrestensen *at no time*

sought to distribute a straight protest handbill even though he had been specifically told by the police authorities that he was entitled to do so. Third, his purpose in distributing a handbill was clearly to increase the profits of his business enterprise. Chrestensen asserts, and it has been stipulated, that the action of the police authorities has diminished his net profits by more than $3,000 (R. 23).

POINT I

A municipality may, in the exercise of its police power, prohibit the street distribution of commercial advertisements.

If there be no distinction in law between a regulation prohibiting the street distribution of commercial handbills, and a regulation prohibiting the street distribution of non-commercial opinion or protest literature, it is futile to discuss either the scope of § 318 of the Sanitary Code or the nature of handbill A. We therefore propose to show at the outset that a municipality may lawfully prohibit the street distribution of commercial advertisements without infringing the right of freedom of the press.

(1)

It is evident from this Court's own decisions that a distinction exists between commercial advertisements on the one hand, and protest or opinion literature on the other, as respects the constitutional guaranty of freedom of the press. Enactments prohibiting outdoor street advertising and billboard advertising have been sustained by this Court without even a mention of freedom of the press. *Fifth Avenue Coach Co.* v. *New York City*, 221 U. S. 467 (1911); *Packer Corporation* v. *Utah*, 285 U. S. 105 (1932). Similarly, second class mailing privileges, which are accorded only to newspapers and periodicals and denied to commercial advertisements, have received un-

stinted approval. *Lewis Publishing Co. v. Morgan*, 229 U. S. 228 (1912); 39 U. S. C., § 226; CHAFFEE, *Freedom of Speech*, pp. 198, 199. Similar discrimination against commercial advertisements has frequently been adopted in tariff regulations. *Van Doorn* v. *U. S.*, 12 Court of Customs Appeals 167 (1924). Also, while the display of a flag for the purpose of expressing a political opinion cannot be constitutionally prohibited, *Stromberg* v. *California*, 283 U. S. 251 (1931), the display of the flag for what this Court has called "mere advertising" purposes can be and is so prohibited. *Halter* v. *Nebraska*, 205 U. S. 34 (1907).

This distinction is based upon the fact that neither the content nor the purpose of commercial advertising matter fits the rationale of the democratic institution of a free press. To restrict the use of commercial advertisements will in no way impair that right to a full and free exchange of opinion and information on matters of public concern which is secured us by the First and Fourteenth Amendments to our Constitution. To appreciate the truth of this, it is only necessary to consider what is meant by a free press, and why our Constitution insists upon it. As was said in *Thornhill v. Alabama*, 310 U. S. 88 (1940), to cite but a single instance (p. 95):

> "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. *Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.*" (Italics ours.)

(2)

Our contention that the unrestricted distribution of commercial advertisements is not essential to maintaining the freedom of the press, has been met primarily with the assertion that this Court has ruled otherwise in *Lovell* v. *Griffin*, 303 U. S. 444 (1938), *Hague* v. *C. I. O.*, 307 U. S. 496 (1939) and *Schneider* v. *State*, 308 U. S. 147 (1939). But to refute this argument of *stare decisis*, it is only necessary to examine the questions which were before the Court in the cases on which the argument is based.

In the *Lovell* case this Court held that a municipality could not prohibit the street distribution of religious tracts setting forth the Gospel of the Kingdom of Jehovah. In the *Hague* case it was held that a municipality could not forbid the street distribution of C. I. O. organizing literature. The *Schneider* case was really four cases. There this Court held that a municipality could not prohibit the street distribution of (1) notices of a protest meeting in connection with the administration of state unemployment insurance, (2) pamphlets of the Watch Tower Bible and Tract Society, a branch of the religious sect known as Jehovah's Witnesses, (3) strike literature, and (4) handbills advertising a meeting to be held under the auspices of "Friends Lincoln Brigade" to discuss the Spanish Civil War.

Manifestly, none of the literature involved in the above cases constitutes commercial advertising as we use that term. In each instance a municipality had attempted to prohibit the distribution of literature which related to matters of public concern, and which was therefore clearly protected by the right of freedom of the press. True, since the notices of the meeting with reference to the war in Spain which were before the Court in the *Schneider* case showed that a stated admission price was to be charged, that fact led to a characterization of those notices as "advertisements". However, as they were advertisements of a meeting which was to be devoted to the discussion of a

political, social and public question, those notices were certainly not *commercial* advertisements. On the contrary, they were *non*-commercial advertisements within the rationale of a free press for the reason that their suppression would have limited the discussion of matters of public concern.

It is respectfully submitted that the decisions above cited went no farther than to hold that street distribution *of literature of the sort which was before the Court* could not be prohibited. There is no reason to suppose that, in so holding, the Court intended so to expand the meaning of "the press" as to overrule the cases cited on page 15, *supra*, or to enunciate a new doctrine to the effect that "the press" embraces every written word. Indeed, the Court has twice indicated that its recent handbill decisions are not to be taken as holding that every written or spoken word is protected by the bill of rights. In *Thornhill* v. *Alabama*, *supra*, p. 16, Mr. Justice MURPHY said (310 U. S., at p. 102):

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as *within that area of free discussion that is guaranteed by the Constitution.*" (Italics ours.)

Similarly, in *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940), Mr. Justice FRANKFURTER said (p. 599):

> "In cases like * * * *Lovell* v. *Griffin*, 303 U. S. 444, *Hague* v. *C. I. O.*, 307 U. S. 498 and *Schneider* v. *State*, 308 U. S. 147, the Court was concerned with restrictions cutting off appropriate means through which, in a free society, *the process of popular rule may effectively function.*" (Italics ours.)

(3)

If it be granted, as it must be, that there is a rational and sound basis for distinguishing between commercial advertisements on the one hand and non-commercial ad-

vertisements on the other, the question of a municipality's power to prohibit the street distribution of commercial advertisements is easily resolved. For the question then becomes one of the extent of the city's police power, as to which there can be no doubt.

The widespread existence of ordinances prohibiting or regulating the street distribution of handbills sufficiently attests the fact that the unfettered street distribution of handbills is a serious municipal problem. We all know that most handbills which are passed out on the streets are soon cast away. They then constitute a traffic hazard, particularly if it is windy and they are blown about; they constitute a health hazard in that sewers and gutters become clogged; for the same reason they constitute a flood hazard; they constitute a fire hazard; and they inevitably result in an additional burden on the municipal budget if only because of the necessity for clearing them from the streets.

Admittedly, non-commercial handbills are as obnoxious in these respects as are commercial handbills. However, given the constitutional guarantee of freedom of the press, the hardships resulting from the distribution of non-commercial handbills must be endured. But such is not the case with regard to commercial handbills. Being without the scope of the Constitution's protection, a municipality is free to adopt such reasonable measures as it sees fit to remedy the evils to which they give rise.

The City of New York has seen fit to solve this problem by prohibiting the street distribution of commercial advertisements. We submit that such a remedy is a reasonable one, and is therefore a proper exercise of the City's police power.

It will scarcely be suggested that a city must allow its citizens to conduct their private businesses on its streets. For example, a City may outlaw push carts and peddlers. By the same token, it may prohibit advertising signs which overhang its streets, it may outlaw advertising signs on buses and trucks which traverse its streets, and it may keep show cases from its sidewalks. What, then, is

so sacrosanct about an advertising handbill that it may not be kept from the streets?

The Circuit Court of Appeals states that a municipality may only regulate, and may not prohibit, the street distribution of commercial advertisements. Among other things, it is suggested that a city might prohibit the *casting away* of such advertisements rather than their *distribution*. To suggestions such as these there are two answers. In the first place, no one can deny that the only practical and effective way of preventing littering is a prohibition against the distribution of handbills, and not through the enactment of impracticable ordinances against casting handbills away after they have been distributed. For, while a single individual is responsible for causing the distribution of handbills advertising a particular business enterprise, those who receive the handbills and cast them away after they have been distributed can be counted only in the hundreds or the thousands. Nor is the Court's suggestion of a "time and place" regulation of the distribution of such handbills a practical one. While regulations as to "time and place" are effective with respect to parades, assemblies and street speakers, they do not fill the bill with respect to handbills, which will be cast away no matter when or where they are distributed. But in any event, the choice of remedies to be adopted to meet a particular situation lies with the legislature and not with the Courts. Therefore, to deny the City the power to remedy an obvious evil by the only practical means of doing so, is not only to exalt the business interests of a few above the welfare of the many, but is to substitute the judgment of the courts for that of the legislature.

It follows that a prohibitory ordinance or regulation which is so drawn as to be limited to commercial advertisements alone is not open to objection on constitutional grounds. Here is but another instance in which the individual's claim of deprivation of property without due process of law must yield to the public's right to have its welfare protected through the exercise of the police power.

POINT II

Section 318 of the Sanitary Code applies only to commercial and business advertising matter.

It has frequently been held that a prohibitory ordinance is to be judged on its face, and not by what is done under it in a particular case. In deference to this rule of law, we wish to emphasize the fact that § 318 of the Sanitary Code—by its express terms—applies only to commercial advertising matter.* Its last sentence reads as follows:

> "This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter."

This is language that is plain and easily understood. Moreover, even before this sentence was added to § 318 in 1938, the New York Courts had made it plain that § 318 was intended to apply to commercial advertising matter only. In 1921 it was held that § 318 in its then form was "never intended to prevent the lawful distribution of anything other than commercial and business advertising matter," and that it did not apply to the circulation of anti-Ku Klux Klan leaflets. *People* v. *Johnson,* 117 Misc. 133 (Gen. Sess., N. Y. Co., 1921). More recently it was held that notices and advertisements of a communist mass meeting were not commercial advertisements within the scope of § 318 even though they set forth the price of ad-

* Exhaustive research has turned up no state decisions forbidding the prohibition of commercial advertisements under ordinances which were so drawn as to apply only to advertisements of such a nature. Cases have been found in which ordinances were held invalid, even as to commercial advertisements, for the reason that they were so broadly or indefinitely drawn as to be capable of application to protest or opinion literature. We recognize the soundness of those decisions. Their irrelevance to the case at bar is demonstrated by the discussion of § 318 of the Sanitary Code which is contained in this Point.

mission to the meeting. *People* v. *Loring and Green* (Mag. Ct., N. Y. Co., 1933, unreported but noted in 1 International Juridical Association Bulletin, No. 12, page 2).

It will be noted that these decisions are in full accord with the *Lovell, Hague* and *Schneider* cases. And in a case which arose after this Court decided those three cases, the precise views which are expressed in this brief were adopted in a case which presented the question of whether the street distribution of a department store advertisement could be prohibited under § 318. In *People* v. *LaRollo,* 24 N. Y. Supp. (2d) 350 (Mag. Ct., N. Y. Co., 1940), the Court held that § 318 was clearly constitutional as applied to such an advertisement. The essence of the Court's opinion is contained in the following quotation (p. 354):

> "The considerations which justify and require that the public interest in the cleanliness of its streets be made subordinate to the more important rights of its citizens freely to proclaim their ideas and principles, are not equally applicable where the individual distributor seeks merely to advertise and solicit patronage for his purely commercial enterprise."

An examination of the New York cases reveals that the New York Courts, in holding that the distribution of *non*-commercial literature could not be restrained under § 318, have consistently done so upon the ground that § 318 *was not intended to apply to such literature.* We therefore submit, first, that the purpose and scope of § 318 are not open to dispute; and, second, that § 318 is not so broad and all-embracing in its application as to be subject to condemnation upon the ground that it applies to literature of the sort which is protected by the Constitution.

POINT III

Christensen's handbill comes within the scope of § 318 of the Sanitary Code.

We come now to the question of whether handbill A constitutes "commercial and business advertising matter" within the meaning of § 318 of the Sanitary Code. The majority of the Court below has held that it is not a commercial handbill, and that it is not "a mere subterfuge." Judge FRANK has reached precisely the opposite conclusion.

It will be recalled that Chrestensen prepared handbill A only after he had been told that he could not distribute handbill No. 1; that he had up to that point made no effort to distribute any protest as to the action of the Dock Commissioner in refusing him the use of a city-owned pier; that he first presented handbill A to the Police Commissioner in proof form and was told that he could distribute the reverse, or protest, side of the proposed handbill without interference; and that at no time did he show the slightest inclination to distribute a handbill that consisted purely of a protest.

We submit that only one conclusion can be drawn from the stipulated facts of this case. Chrestensen was conducting a commercial enterprise for profit alone. The only reasonable inference is that he added the reverse, or protest, side of handbill A solely in the hope that to do so would make it possible for him to distribute its face, or advertising, side. Thus he would increase his profits. It must not be forgotten that he has stated, and it has been stipulated, that the prohibition of handbill A under § 318 would result in a decrease in the number of persons paying admission fees to his submarine, and would thereby deprive him of net profits in excess of $3,000 (R. 23).

The majority of the Court below disagreed, in principle, with our view that the courts should inquire into the cir-

cumstances surrounding the origin and purpose of hybrid handbills such as that involved here, and then decide whether they were or were not commercial in character. To do so, said Judge CLARK, would lead to "uncertainty, not to speak of unreality", and would necessitate the drawing of a line where none clearly appears.* But, as Judge FRANK pointed out, the making of such decisions and the drawing of such lines is inherent in the nature of the judicial process. It was Mr. Justice HOLMES who frequently stated that where to draw such lines "is the question in pretty much everything worth arguing in the law." Judge CLARK might as well criticize the concepts of "negligence," the "reasonable man," "restraint of trade" and many others long rooted in our jurisprudence. The courts must explore the penumbra which lies between light and darkness.

We therefore respectfully urge that, so far as the facts of this case go, Judge FRANK was correct in characterizing the situation as follows:

> "And especially in the instant case there need be no judicial anguish in drawing a line and no occasion for psychological probings of Chrestensen's mental interior in order to ascertain what he was after, when endeavoring to distribute the matter on the face of Exhibit A: * * *".

A word as to policy. We submit that every consideration of policy requires a holding that a handbill such as this should not be given the protection of the First and Fourteenth Amendments to the Constitution. The civil

* We know of only one other case involving a hybrid handbill, *People* v. *Taylor*, 33 Cal. App. (2d) 760, 85 P. (2d) 978 (1938). The handbill with whose distribution the Court there refused to interfere was a four-page mimeograph published by the San Diego Communist Party Election Campaign Committee which was devoted mainly to political discussion, but which contained an advertisement of a non-profit bookstore. The Court had no difficulty in holding that such a pamphlet fell on the "free press" side of the line.

right of freedom of the press is a precious and valuable safeguard of our way of life. As such, the Courts must be as vigilant to see that it is not abused, as they are to see that it is observed. Only thus will it be accorded the respect which is its due, and only thus will it preserve its usefulness and value.

The decision below has opened the way for the owner of every business enterprise in the country to flood the streets of our cities with commercial advertising under the guise of exercising the right of freedom of the press. That this will create an administrative problem of the first magnitude for municipalities is bad enough. But what is worse, it will inevitably tend to decrease the regard in which our civil rights are held. For, to put it bluntly, Chrestensen has been permitted to exploit the bill of rights to promote a purely commercial enterprise. That he should not be permitted to do, any more than he should be permitted to use the Flag for advertising purposes. *Cf. Halter* v. *Nebraska, supra,* page 16.

We therefore submit that the Court below erred on two counts on this branch of the case. First, in its interpretation of the facts, which led to the erroneous holding that handbill A is not "commercial and business advertising matter." Second, in its conception of policy, which led to the likewise erroneous holding that every effort should be made to hold that hybrid handbills such as these fall on the protected side of the line.

CONCLUSION.

This case raises a question of constitutional law which is of such importance that it will eventually have to be decided by this Court. That question, whether a municipality may prohibit the street distribution of commercial advertisements, arises here in connection with a handbill which is of a hybrid nature. That circumstance makes this a particularly good case in which to consider this important problem. For, as our record suggests, if

this Court were to hold in a case involving a straight commercial handbill that a city could prevent the distribution of such a handbill, some ingenious individual would promptly test the limits of that decision by devising a hybrid handbill consisting partly of advertising matter and partly of protest matter. But if this petition be granted, the Court can consider both questions at one and the same time. Only when that has been done will municipal authorities be fully apprised of the scope of their powers with respect to the distribution of commercial handbills.

The petition for certiorari should be granted.

New York, N. Y., October 20, 1941.

Respectfully submitted,

WILLIAM C. CHANLER,
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Counsel for Petitioner.

WILLIAM S. GAUD, JR.,
of Counsel.

Supreme Court of the United States

No. 707. October Term, 1941.

LEWIS J. VALENTINE, individually and as Police Commissioner of The City of New York,

Petitioner,

against

F. J. CHRESTENSEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

February 26, 1942.

WILLIAM C. CHANLER,
Corporation Counsel,
Counsel for Petitioner.

WILLIAM S. GAUD, JR.,
LEO BROWN,
WILLIAM B. TRAFFORD,
of Counsel.

OUTLINE OF ARGUMENT.

Table of Cases Cited.

Other Authorities.

Supreme Court of the United States

No. 707. October Term, 1941.

LEWIS J. VALENTINE, individually and as Police Commissioner of The City of New York,

Petitioner,

against

F. J. CHRESTENSEN.

BRIEF FOR PETITIONER

A writ of certiorari was granted by this Court on November 24, 1941, to review a final decree (R., 51-52) of the United States Circuit Court of Appeals for the Second Circuit, affirming (FRANK, Cir. J., dissenting) a final decree (R., 9-10) made by the United States District Court for the Southern District of New York (HULBERT, J.), which (so far as relevant) adjudged "that Section 318 of the Sanitary Code of the City of New York * * * insofar as it prohibits the distribution of handbills containing commercial or business advertising matter upon * * * streets, sidewalks and public places of New York City * * * is unconstitutional and invalid as applied to the distribution" by respondent of the handbill involved in this suit, and which perpetually enjoined the Police Department from interfering with the distribution of such handbill upon the streets and other public places of the City.

The Proceedings Below.

Respondent instituted suit in the United States District Court for the Southern District of New York to enjoin petitioner from interfering with the distribution of his

handbill (Pltf. Exh. A; R., 18A-18B) on the streets and other public places in the City of New York. Jurisdiction was alleged to exist under § 24(1) of the Judicial Code (28 U. S. C. § 41[1]), the amount involved assertedly being in excess of $3,000, and also under § 24(14) of the Judicial Code (28 U. S. C. § 41 [14]), upon the alleged deprivation of constitutional rights. The District Court granted respondent's motion for an injunction *pendente lite*, holding § 318 of the Sanitary Code invalid on its face. After a trial at which the facts were stipulated (R., 15-18), the District Court entered a final decree granting a permanent injunction (R., 9-10)*. The opinion of the District Court is reported in 34 F. Supp. 596, and reprinted as an Appendix, *post*, p. 39.

On appeal to the Circuit Court of Appeals, that Court affirmed the District Court, 122 F. (2d) 511. CLARK, Cir. J. (with whom SWAN, Cir. J., concurred), wrote the prevailing opinion; FRANK, Cir. J., wrote a dissenting opinion. The order of affirmance (R., 51-52) was filed August 14, 1941.

Jurisdiction.

The order of the United States Circuit Court of Appeals for the Second Circuit was filed August 19, 1941. The jurisdiction of this Court is based on U. S. Code, tit. 28, § 347, subd. (a). The petition was filed in this Court on October 21, 1941, and was granted November 24, 1941.

Summary Statement of the Case.

Respondent sought to distribute on the streets of New York City a handbill advertising a purely commercial ven-

* A further contention by respondent which involved the constitutionality of a City park regulation (New York City Park Department Regulations, Art. II, § 6, R., 4) was decided adversely to him in the District Court (R., 10), but respondent took no appeal.

ture. The Police Commissioner informed him that such distribution was forbidden under § 318 of the Sanitary Code, which prohibits only the street distribution of commercial handbills. Thereupon respondent printed upon the back of the handbill a protest against the acts of a certain public official, and sought to distribute this doublefaced handbill upon the public streets.

The Police Commissioner objected, and the present suit was brought to restrain him. The courts below held that interference with the street distribution of this handbill violated the First and Fourteenth Amendments to the Constitution of the United States.

Thus, two questions, never before passed upon by this Court, are presented: first, whether a municipality may constitutionally prohibit the street distribution of commercial advertising; and secondly, whether such a prohibition, if valid, may be evaded by the device of adding to a purely commercial handbill, a gratuitous attack upon a public official.

The Facts.

The material facts were stipulated at the trial (R., 15-18). As stipulated, they were found by the District Court (R., 8).

Respondent, F. J. Chrestensen, owns, and exhibits for profit, the former United States Navy Submarine S-49. When he brought his submarine to New York City in the late Spring of 1940, he sought permission from the City Dock Commissioner to exhibit it at a City-owned pier. This permission was denied him in accordance with an established City policy not to permit the use of city-owned docks for purposes of commercial exploitation un-related to navigation. He thereupon obtained the use of a nearby state-owned pier, Pier 5 on the East River, New York City. In the latter part of June, 1940, while the S-49 was on exhibi-

tion at that pier, Chrestensen prepared and printed a handbill to advertise the submarine, describing its attractions and soliciting public patronage at a stated admission price (R., 18C). This handbill is hereinafter referred to as "handbill No. 1".

When Chrestensen attempted to have handbill No. 1 distributed on the public streets of the City, he was advised by petitioner, the Police Commissioner, that this would violate § 318 of the Sanitary Code, which prohibits such distribution of "commercial and business advertising matter". He was further advised, however, that he was free to distribute handbills devoted solely to "information or a public protest" (R., 17).

Thereupon Chrestensen prepared and exhibited to the Police Commissioner in proof form, a double-faced handbill (Pltf. Exh. A; R., 18A-18B). Its face was a revision of handbill No. 1, and it is stipulated that it contains nothing but commercial advertising matter (R., 17). Its reverse side, it is stipulated, consists of a protest against the conduct of the City Dock Department in denying him wharfage facilities for the exhibition of the submarine, and is devoid of advertising matter (*ibid.*). This second handbill is hereinafter referred to as "handbill A". When Chrestensen submitted the printer's proof of handbill A to the Police Department, he was advised that a handbill consisting solely of the protest matter printed on its reverse side could be distributed without violating § 318 of the Sanitary Code and without restraint but that the double-faced handbill could not (R., 17-18). He nevertheless went forward with his plans, had handbill A printed up as a single document and as a result was restrained from distributing it by the police authorities (*ibid.*). This suit was then brought to enjoin the Police Commissioner from interfering with its distribution (R., 18).

Three facts deserve special mention. First, Chrestensen's sole purpose in distributing a handbill was clearly to increase the profits of his business enterprise; he alleges, and it has been stipulated, that the action of the police authorities had diminished his net profits by more than $3,000 (R., 18). Second, Chrestensen made no attempt to prepare or distribute a protest against the Dock Commissioner until *after* he had been advised that he could not distribute a straight commercial handbill such as handbill No. 1. Third, Chrestensen *at no time* sought to distribute a straight protest handbill even though he had been specifically advised by the police authorities that he had a right to do so.

Thus it is apparent that the addition of the protest was a mere subterfuge, added for the sole purpose of evading the prohibition against the distribution of commercial advertising on the city streets contained in § 318 of the Sanitary Code. Had Chrestensen had any bona fide interest in the distribution of his protest, he could have followed the advice of the police and had it printed on a separate sheet of paper, at practically no added expense.

The Regulation Involved.

Section 318 of the Sanitary Code of New York City (Health Department Regulations, Art. III, § 318) provides:

> **"Handbills, cards and circulars.**—No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letterbox therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. *This section*

is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter." (Italics ours.)

The first sentence of this enactment is derived from a series of ordinances framed in almost identical language which were in effect for at least thirty years prior to 1938. The ordinance was then transmuted into the present Health Department regulation, at which time the last sentence was added.

The Issues.

Section 318 of the Sanitary Code expressly declares that it applies only to "commercial and business advertising matter". The Courts of New York have consistently held that this regulation applies only to those advertisements which are intended to attract the attention and patronage of the public to enterprises entered into for pecuniary gain. Well before the decisions in *Lovell* v. *Griffin*, 303 U. S. 444 (1938) and *Schneider* v. *State*, 308 U. S. 147 (1939), the New York Courts held that §318 and its predecessor did not apply (1) to *non-commercial advertisements* (*i. e.*, advertisements of meetings held in furtherance of some political, social, economic or other movement, irrespective of whether an admission is charged therefor), or (2) to *non-commercial* literature (*i. e.*, written matter calculated to communicate information or opinions on matters of public concern). Accordingly, there is squarely presented the question of whether a regulation that is narrowly limited to *commercial advertisements* is constitutional; and the further question of whether, if such a regulation is constitutional, it may be evaded by the device of adding to the back of a purely commercial handbill, a gratuitous protest against the action of a public official.

This Court has never passed upon the question of whether the street distribution of *commercial* advertise-

ments may be prohibited. To date the Court has merely held that the street distribution of non-commercial advertisements (such as an advertisement of a political meeting, even though admission was charged) may not be prohibited. We contend that the street distribution of commercial advertisements is in no way essential to a full and free exchange of information, ideas and opinions on matters of public concern; that the street distribution of commercial advertisements is not protected by the freedom of press that is secured by the First and Fourteenth Amendments to the Constitution; that the prohibition of such street distribution is not a deprivation of property without due process or a denial of the equal protection of the laws; and that the street distribution of such advertisements may therefore be prohibited under the police power.

We further contend that the question of whether a hybrid handbill is or is not a commercial advertisement depends upon the facts and circumstances of a particular case, and that the facts which have been stipulated in the instant case demonstrate that handbill A is unquestionably a commercial advertisement.

The Opinions Below.

There are three opinions in connection with the determination of this controversy, *viz.*, that of the District Court in granting respondent's motion for a preliminary injunction (the only opinion of the District Court), that of the majority of the Circuit Court of Appeals, and that of the dissenting Circuit Judge.

(i)

In its opinion granting respondent's application for an injunction *pendente lite**, the District Court held § 318 of

* This opinion was inadvertently omitted from the record. It is reprinted in Appendix, *post*, p. 39.

the Sanitary Code unconstitutional and invalid on its face, relying primarily upon *Lovell* v. *Griffin*, 303 U. S. 444 (1938), *Schneider* v. *State*, 308 U. S. 147 (1939) and *People* v. *Taylor*, 33 Cal. App. (2d) 760, 85 Pac. (2d) 978 (1938). The Court also held that respondent was deprived of constitutional rights by reason of the discriminatory nature of the ordinance, saying that "The ordinance is clearly discriminatory against the business man while affording protection to persons distributing non-commercial handbills" (Appendix, pp. 47-48). When the final decree was entered, however, the District Court did not go so far. It did not hold § 318 to be entirely invalid. Instead, it made a finding that insofar as § 318 prohibits the distribution of handbills such as respondent's, it abridges the freedom of the press secured by the First and Fourteenth Amendments (R., 8), is discriminatory, and constitutes a deprivation of property without due process (*ibid.*). Thus the Court narrowed its prior holding that the ordinance is invalid on its face to a holding that the ordinance is invalid as applied.

(ii)

In the majority opinion of the Circuit Court of Appeals (R., 21-32), which affirmed the District Court, Judge CLARK interpreted *Schneider* v. *State, supra,* as holding that a municipality could not prohibit the street distribution of commercial handbills. As to this, he said (R., 28):

> "We think, therefore, that interpretation of the conclusions of the *Schneider* case is not doubtful. Absolute prohibition of expression 'in the market place' is illegal, not to be saved by any commercial taint attached to the expression; reasonable regulation of soliciting, not preventing freedom of expression, is permissible."

Judge CLARK proceeded to discuss at some length the application to the handbill before him (Pltf. Exh. A; R., 18A-18B) of the distinction that has been drawn by the Legislature and Courts of New York between commercial and non-commercial handbills. On this aspect of the case, he rejected as uncertain and unreal petitioner's argument that the nature of a handbill was to be judged by the circumstances out of which it came to be printed, its purpose and its contents (R., 30-31). In conclusion, he stated the effect and scope of his decision as follows (R., 32):

> "To avoid misunderstanding, perhaps we should say that, while absolute prohibition of commercial handbills seems to us of doubtful validity, yet we decide no more here than that at least it cannot extend to a combined protest and advertisement not shown to be a mere subterfuge."

(iii)

Judge FRANK dissented from the entire opinion of the majority (R., 32-51). He concluded that it was apparent from the stipulated facts that respondent's sole purpose in trying to distribute his handbill was commercial, that there was no evidence of mixed motives on respondent's part and that respondent's handbill must be considered a commercial circular (R., 32-42). Judge FRANK also stated that, in his opinion, *Lovell* v. *Griffen*, *supra*, and *Schneider* v. *State*, *supra*, were not to be read as overruling earlier decisions of this Court (such as those respecting outdoor advertising and billboards) which are wholly inconsistent with the proposition that commercial advertisements are protected by the right of freedom of the press (R., 46-47). On the contrary, Judge FRANK said, the *Lovell* and *Schneider* cases referred only to "historic weapons in the

defense of liberty" and "restrictions cutting off appropriate means through which, in a free society, the processes of popular rule may effectively function" (R., 47). Going on from there to consider as a question of first impression the City's power to prohibit the distribution of commercial handbills, Judge FRANK concluded that the right to disseminate opinion and information encompassed by the Constitutional guarantee did not extend to commercial advertisements, and that the City's police power validly extended to the adoption and enforcement of a regulation prohibiting the street distribution of commercial handbills such as respondent's (R., 47-51).

Specification of Errors to be Urged

1. We contend that the Circuit Court of Appeals erred in holding that handbill A is not a commercial advertisement* and is not a subterfuge devised in an effort to evade § 318 of the Sanitary Code.

2. We further contend that the Circuit Court of Appeals erred in refusing to hold that the City of New York in the exercise of its police power may prohibit the street distribution of commercial advertisements without violat-

* It should be kept in mind that the term "commercial advertisement", as used in this brief, excludes all such advertisements as those which relate to books or circulars of a political, religious or social nature, or those which relate to public meetings devoted to subjects of general interest at which an admission may be charged. In short, the term "commercial advertisement" is here restricted to include only those advertisements which are circulated for purposes of private gain in connection with a purely commercial enterprise such as the exhibition for profit of a privately owned submarine.

ing the right of freedom of the press that is secured by the First and Fourteenth Amendments to the Constitution of the United States, and without violating the due process clause or the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

3. We contend that the Circuit Court of Appeals erred in refusing to hold that § 318 of the Sanitary Code is constitutional and valid both on its face and as applied to handbills such as handbill A.

Argument.

Upon the record as outlined above, we shall argue as follows:

1. A municipality may, in the exercise of the police power, prohibit the distribution of commercial advertising in streets and other public places. A municipal regulation prohibiting such distribution does not abridge the freedom of the press secured by the First and Fourteenth Amendments to the Constitution of the United States and does not entail a deprivation of property without due process or denial of the equal protection of the laws within the contemplation of the Fourteenth Amendment to the Constitution of the United States.

2. Section 318 of the Sanitary Code prohibits only the street distribution of commercial and business advertising matter, and is therefore constitutional.

3. A valid prohibition against the street distribution of commercial advertising may not be evaded by the device of adding to a purely commercial handbill a gratuitous protest against the acts of public officials such as that involved in this case.

POINT I.

A municipality may, in the exercise of the police power, prohibit the distribution of commercial advertising in streets and other public places. A municipal regulation prohibiting such distribution does not abridge the freedom of the press secured by the First and Fourteenth Amendments to the Constitution of the United States and does not entail a deprivation of property without due process or a denial of the equal protection of the laws within the contemplation of the Fourteenth Amendment to the Constitution of the United States.

The first question in this controversy is whether a valid distinction can be made between a regulation which prohibits the street distribution of commercial advertising and a regulation which prohibits the distribution of non-commercial or protest literature. If there be no such distinction in law, it is futile to discuss the scope of § 318 of the Sanitary Code or the nature of handbill A. We therefore propose to show at the outset that a municipality may lawfully prohibit the street distribution of commercial advertisements without violating any constitutional rights.

1. The distinction between commercial advertisements and protest or opinion literature in respect of constitutional guarantees is inherent in the decisions of this Court.

The decisions of this Court touching upon the printed word have sharply distinguished between commercial advertisements on the one hand and protest or opinion literature on the other. Enactments prohibiting outdoor street advertising and billboard advertising have been sustained by this

Court without even a mention of freedom of the press. *Fifth Avenue Coach Company* v. *City of New York*, 221 U. S. 467 (1911); *Packer Corporation* v. *Utah*, 285 U. S. 105 (1932). So, too, second class mailing privileges, which are accorded only to newspapers and periodicals and expressly denied to commercial advertisements, have received unstinted approval. *Lewis Publishing Company* v. *Morgan*, 229 U. S. 288, 313-316 (1912); 39 U. S. C. § 226.* Similar discrimination against commercial advertisements has frequently been adopted in tariff regulations. *Van Doorn* v. *U. S.*, 12 Court of Customs Appeals 167 (1924). Also, while the display of a flag for the purpose of expressing a political opinion cannot be constitutionally prohibited, *Stromberg* v. *California*, 283 U. S. 359, 369 (1931), the display of the flag for which this Court has called "mere advertising" purposes can be and is so prohibited. *Halter* v. *Nebraska*, 205 U. S. 34 (1907).

Finally, while the decision of this Court in *Mutual Film Corporation* v. *Industrial Commission of Ohio*, 236 U. S. 230 (1915), which upheld the right of a State to censor motion pictures prior to exhibition, must be read against the background of its historical setting,† the language of

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* It is clear that withholding second class privileges from a newspaper or periodical constitutes a curtailment of the dissemination of information and opinion on matters of public concern and thus a *de facto* interference with freedom of the press. See, Chafee, *Free Speech in the United States* (1941), pages 98-99, 169, 302 *ff*. Whether it constitutes a *de jure* abridgment of freedom of the press, is apparently still undecided. See, *Ex Parte Jackson*, 96 U. S. 727 (1877); *Public Clearing House* v. *Coyne*, 194 U. S. 497, 506-508 (1904); *Milwaukee Publishing Company* v. *Burleson*, 255 U. S. 407, 417 (1921); Chafee, *Free Speech in the United States*, page 299; Deutsch, *Freedom of the Press and of the Mails*, 36 Mich. L. Rev. 703 (1938).

† See Chafee, *Free Speech in the United States*, pages 294, 544. Not only had this Court not yet held that the protection of the rights secured by the First Amendment extended to encroachment by the States, but, as the author points out, "The Court could not then realize the importance of this new method for communicating facts and ideas to great masses of the public."

the opinion is apposite. This Court there declared (pp. 243-244):

> "We immediately feel that the argument is wrong or strained which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on the bill-boards of our cities and towns and which regards them as emblems of public safety, to use the words of Lord Camden, quoted by counsel, and which seeks to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion.
>
> The judicial sense supporting the common sense of the country is against the contention. * * * It seems not to have occurred to anybody in the cited cases that freedom of opinion was repressed in the exertion of the power which was illustrated. The rights of property were only considered as involved. It cannot be put out of view that *the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country or as organs of public opinion.*" (Italics ours).

2. The distinction between commercial advertisements and protest or opinion literature is dictated by the constitutional concept of freedom of the press.

The distinction between commercial advertisements and opinion or protest literature is based upon the fact that neither the content nor the purpose of commercial advertising matter fits the rationale of the democratic institution of a free press guaranteed by our Constitution. A restriction upon the right to use the public streets for purposes of commercial advertisements in no way impairs that right to a free and full exchange of opinion and information on

matters of public concern which is secured to us by the First and Fourteenth Amendments. To appreciate the truth of this, it is necessary only to consider what is meant by a free press, and why our Constitution insists upon it.

In *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233 (1936), this Court had occasion to say (p. 250):

> "The predominant purpose of the grant of immunity here invoked was *to preserve an untrammeled press as a vital source of public information.* The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; *and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press* cannot be regarded otherwise than with grave concern." (Italics ours.)

The nature of freedom of the press was cogently stated in *Thornhill* v. *Alabama*, 310 U. S. 88, 95, 101-102 (1940), where it was said (p. 95):

> "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. *Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error*

through the processes of popular government." (Italics ours.)

See also *Carlson* v. *California*, 310 U. S. 106 (1940); *C. I. O.* v. *Hague*, 25 F. Supp. 127, 132 *ff.* (1938), aff'd 307 U. S. 496 (1939); 2 Cooley, *Constitutional Limitations* (8th Ed., 1927) pages 885-886.

Quotations expressing these same considerations could be multiplied endlessly. They lead to but one conclusion,—that these considerations are all completely foreign to the function of commercial advertising in a democratic society. Commercial advertisements do not serve to aid the public in the discovery of "political and economic truth"; they serve only to make known to the public what the advertiser seeks to sell. Their motive is not "public education"; it is by definition always one of personal profit. A restriction upon the distribution of commercial advertising on the public streets undoubtedly increases the cost of selling the advertised product, by compelling the seller to pay for advertising space in the press or on bill-boards; but suppression of opinion and protest must lead eventually to the end of democratic government and institutions for all of us.

3. The recent decisions of this Court in the handbill cases relate only to non-commercial handbills, and distinguish between such handbills and commercial advertising.

Our contention that the unrestricted distribution of commercial advertisements is not essential to maintaining the freedom of the press has been met primarily with the assertion that this Court has ruled otherwise in *Lovell* v. *Griffin*, 303 U. S. 444 (1938), *Hague* v. *C. I. O.*, 307 U. S. 496 (1939), and *Schneider* v. *State*, 308 U. S. 147 (1939).* But to show that the argument involves an unwarranted exten-

* See Appendix, pp. 42-47; and R., 26-28.

sion, if not an actual misreading, of what was held, it is necessary only to examine the questions which were before the Court in those cases.

In the *Lovell* case, this Court held that a municipality could not prohibit the street distribution of religious tracts, setting forth the gospel of the "Kingdom of Jehovah". In the *Hague* case it was held that a municipality could not forbid the street distribution of organizing literature by the Committee of Industrial Organization. The *Schneider* case was really four cases. This Court there held that a municipality could not prohibit the street distribution of (1) notices of a protest meeting in connection with the administration of State unemployment insurance, (2) pamphlets of the Watch Tower Bible and Tract Society, a branch of the religious sect known as Jehovah's Witnesses, (3) strike literature, and (4) handbills advertising a meeting to be held under the auspices of "Friends Lincoln Brigade" to discuss the Spanish Civil War.

Manifestly, none of the pieces of literature involved in the above cases constitutes commercial advertising as we use that term. In each instance a municipality had attempted to prohibit the distribution of handbills dealing with economic, political, social or religious questions upon which information or opinion was being disseminated. The free distribution of such material was clearly protected by the guarantee of freedom of the press. True, since the notices of the meeting with reference to the war in Spain, which were before the Court in the *Schneider* case, showed that a stated admission price was to be charged, that fact led to a characterization of those notices as "commercial advertising" (see 308 U. S., at p. 155, footnote). However, as they were in fact invitations to a meeting which was to be devoted to the expression of views on a political and social question of public concern, they were clearly not *commercial*

advertisements, in the sense that they were advertising a commercial enterprise operated for profit. On the contrary, they were *non*-commercial advertisements within the concept of freedom of the press, for their suppression would have limited the free discussion of matters of public concern *.

We respectfully submit that the decisions of this Court above cited went no farther than to hold that street distribution of *literature of the kind which was before the Court* could not be prohibited. There is no reason to suppose that this Court, in deciding as it did, intended so to expand the meaning of "freedom of the press" as to overrule and nullify the cases discussed on pages 13-14, *supra*, or to enunciate a new doctrine to the effect that *every* printed word may be distributed *ad lib* on the city streets. Indeed, in the *Schneider* case, this Court specifically held as an abridgement of the constitutional liberty only the prohibition of such activity as bears a "necessary relationship to the freedom to speak, write, print or distribute *information or opinion*" (308 U. S., at p. 161; italics ours), and went on to say (p. 165):

> "We are not to be taken as holding that *commercial* soliciting and canvassing may not be subjected to such regulation as the ordinance requires." (Italics ours.)

Moreover, in *Lovell* v. *Griffin*, 303 U. S. 444, *supra*, this Court cited with approval *Coughlin* v. *Sullivan*, 100 N. J. L. 42, 126 Atl. 177 (1924), which emphatically announces a line of distinction between commercial and non-commercial

* With regard to that phase of the *Schneider* decision, it has been said: "An invitation to discussion is more than commercial advertising; it is part of the process of making discussion effective." Chafee, *Free Speech in the United States*, page 404. Thus, the announcement is an essential ingredient of freedom of discussion in the same manner as distribution of a publication is an essential ingredient of freedom of the press. *Cf. Ex Parte Jackson*, *supra*, 96 U. S. 727; *Lovell* v. *Griffin*, *supra*, 303 U. S., at page 452.

matter. It is cited under a "See also" for the proposition that (303 U. S., at p. 452);

> "The press in its historic connotation comprehends *every sort of publication which affords a vehicle of information and opinion.* What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from *every sort of infringement* need not be repeated." (Italics ours.)

Yet the New Jersey Court had said, in distinguishing between commercial and non-commercial matter (100 N. J. L., at p. 43):

> "It is a matter of common knowledge, of which the court will take judicial notice, that certain circulars, pamphlets, etc., especially such as advertise commercial or business enterprises, when indiscriminately distributed to pedestrians, having no desire or use for them, are cast away so as to litter the streets. The natural and ordinary result of the distribution of such circulars being to litter the streets, an ordinance prohibiting their distribution is adapted to, and reasonably necessary to prevent, such evil. The principle is elucidated in *Harwood* v. *Trembley*, 97 N. J. L. 173.
>
> *The pamphlet here in question is of a different nature,* containing, as it does, the views of a number of citizens as to the management or alleged mismanagement of municipal affairs, a matter in which they, as well as other citizens, are vitally concerned." (Italics ours.)

Thus this Court chose, as exemplifying the scrupulous protection of freedom of the press, a decision which distinguishes sharply between commercial advertisements on the one hand and non-commercial matter on the other.

Finally, this Court has three times indicated that its recent handbill decisions are not to be taken as holding

that every written or spoken word is protected by the Bill of Rights. In *Thornhill* v. *Alabama* (*ante*, p. 15), this Court said (310 U. S., at p. 102):

> "In the circumstances of our times the dissemination of information concerning facts of a labor dispute must be regarded as *within that area of free discussion that is guaranteed by the Constitution.*" (Italics ours.)

Similarly, in *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940), the Court stated (p. 599n):

> "In cases like • • • *Lovell* v. *Griffin* 303 U. S. 444, *Hague* v. *C. I. O.*, 307 U. S. 498 and *Schneider* v. *State*, 308 U. S. 147, the Court was concerned with restrictions cutting off appropriate means through which, in a free society, *the process of popular rule may effectively function.*" (Italics ours.)

And see *Cox* v. *New Hampshire*, 312 U. S. 569, 577-578 (1941).

4. A municipal regulation prohibiting the street distribution of commercial advertising is a valid exercise of the police power and entails no deprivation of property without due process.

The widespread existence of ordinances prohibiting or regulating the street distribution of handbills sufficiently attests to the fact that the unfettered street distribution of handbills is a serious municipal problem. It is a matter of common knowledge, of which the Court have uniformly taken judicial notice, that most handbills which are passed out on the streets are soon cast away; that they then become a grave traffic hazard; that they constitute a hazard to health by the consequent clogging of gutters and

sewers; that for the same reason they constitute a flood hazard; that they constitute a fire hazard, and that they inevitably result in an additional burden upon the municipal budget if only because of the necessity of clearing them from the streets. Taking judicial notice of these matters, the Courts agree that it lies within the municipality's police powers to prohibit the distribution of commercial advertising matter. *People* v. *Horowitz*, 27 N. Y. Cr. R. 237, 140 N. Y. Supp. 437 (1912); *Allen* v. *McGovern*, 12 N. J. Misc. 12, 169 Atl. 345 (1933); *People* v. *St. John*, 108 Cal. App. 779, 288 Pac. 53 (1930); *Philadelphia* v. *Brabender*, 201 Pa. 574, 51 Atl. 374 (1902); *In re Anderson*, 69 Neb. 686, 96 N. W. 149 (1903); *Wettengel* v. *City of Denver*, 20 Colo. 552, 39 Pac. 343 (1895); *Sieroty* v. *City of Huntington Park*, 111 Cal. App. 377, 295 Pac. 564 (1931).

In upholding an ordinance prohibiting distribution of advertising circulars, the Indiana Supreme Court held directly that a commercial advertiser "has no property right in the privilege of distributing handbills and advertising matter". *Goldblatt Bros. Corporation* v. *City of East Chicago*, 211 Ind. 621, 627, 6 N.E. (2d) 331, (1937). And in holding valid an ordinance prohibiting sales of any articles except newspapers on the streets in certain congested districts, the Court, in *Chicago* v. *Rhine*, 363 Ill. 619, 2 N.E. (2d) 905 (1936), said (pp. 624-625):

> "He [the defendant] is seeking to carry out his private commercial enterprise for his own personal financial profit on the streets within the loop district, one of the forbidden domains. Although he may have, prior to the passage of the ordinance, pursued his calling on the streets, his use thereof was solely a permissive one. He had no inherent right to operate his business in or upon the streets of the city. • • •

> The defendant had no property right in the use of any of the streets of Chicago for the location and maintenance of his business. He was therefore not deprived of liberty and property without due process of law; nor did the ordinance deprive him of any equality of right, contrary to the Fourteenth Amendment of the United States Constitution * * *."

That the prohibition of the distribution of commercial advertising constitutes a proper exercise of the police power and does not entail the deprivation of property without due process is sustained in an exhaustive opinion in *San Francisco Shopping News Co.* v. *City of South San Francisco*, 69 F. (2d) 879 (C. C. A. 9th, 1934), cert. den. 293 U. S. 606 (1934). And, as this Court has said in *Fifth Avenue Coach Company* v. *City of New York, supra*, 221 U. S. at p. 483, "If the ordinance was a proper exercise of the police power, plaintiff was not deprived of his property without due process of law".

Admittedly, non-commercial handbills are perhaps as obnoxious in respect of littering the streets as are commercial handbills. However, given the constitutional guarantee of freedom of the press, the hardships resulting from their distribution must be endured. This Court made this clear in *Schneider* v. *State, supra*, where it was said (308 U. S. at p. 163):

> "As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution."

But, as we have demonstrated above, such is not the case with commercial handbills. Falling outside of the area of the Constitution's protection of free communication, a municipality is free to adopt such reasonable methods as it sees fit to remedy the evils to which their street distribution

gives rise. What those methods shall be is for the sole determination of the Legislature; it is outside the power of the Courts to decide whether some other or better means of meeting the evils might have been chosen. The question of "reasonableness" is for the Court only as it bears upon the constitutionality of the enactment. *In re Anderson, supra*, 69 Nev. 686, 688, 96 N. W. 149; *San Francisco Shopping News Co.* v. *City of South San Francisco, supra*, 69 F. (2d) 879, 885-890, cert. den. 293 U. S. 606; *Watters* v. *Indianapolis*, 191 Ind. 671, 673-674, 134 N.E. 482 (1922). In *Williams* v. *Mayor of Baltimore*, 289 U. S. 36 (1933), Mr. Justice CARDOZO said (p. 42):

> "It is not the function of a court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived. • • • The judicial function is exhausted with the discovery that the relation between means and ends is not wholly vain and fanciful, an illusory pretense."

The City of New York has seen fit to solve this problem by prohibiting the distribution of commercial advertisements on the streets of the City. We submit that the choice was one for the City, and since the remedy is a reasonable one, it is a proper exercise of the police power.

It is clear that a city need not allow its residents to conduct their private businesses on its streets. Thus, a city may outlaw pushcarts and peddlers; it may prohibit advertising signs which overhang the streets; it may outlaw advertising signs on buses and trucks which traverse the streets; and it may keep showcases from its sidewalks. What, then, is so sacrosanct about an advertising handbill that it may not be kept from the streets?

The majority of the Circuit Court of Appeals state that a municipality may only regulate, but may not prohibit, the

street distribution of commercial advertisements (R., 27, 28, 31-32). Among other things it is suggested that a city might prohibit the *casting away* of such advertisements by recipients rather than their *distribution* by advertisers (R. 32). To suggestions such as these there are three answers. In the first place, it is perfectly obvious that the power to regulate commercial advertising must include the power to prohibit its distribution on the public streets. *The Lottery Case*, 188 U. S. 321, 355 (1903); *United States* v. *Hill*, 248 U. S. 420, 425 (1919); *Director General of Railroads* v. *Viscose Company*, 254 U. S. 498, 503 (1921); *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334, 346-347 (1937). In the second place, it cannot be denied that the only effective and practical way of preventing littering is a prohibition against the distribution of handbills, and not through enactments against casting handbills away after they are distributed. For, while a single individual is responsbile for causing the distribution of the handbills advertising a particular business enterprise, those who receive the handbills and cast them away after distribution can be counted only by the hundreds or the thousands.

Nor is the Court's suggestion (R., 27, 28, 32) of a "time and place" regulation of the distribution of such handbills a practical one. While regulations of "time and place" are effective with respect to parades, street speakers and assemblies, they fall short when applied to distribution of handbills, which will be cast away no matter when or where they are distributed.

But the decisive answer to these suggestions is that the choice of remedies to be adopted lies with the Legislature and not with the Courts. Therefore, to deny the City the power to remedy a patent evil by the only effective means of doing so is not only to exalt the business interests of

the few above the welfare of the many, but is to substitute the judgment of the Courts for that of the legislature—doctrines unqualifiedly repudiated by this Court. Most appropriate are the statements of Mr. Justice HUGHES in *Purity Extract Company* v. *Lynch*, 226 U. S. 192 (1912), where he said (pp. 201-202):

> "It is also well established that when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government. *Booth* v. *Illinois*, 184 U. S. 425; *Otis* v. *Parker*, 187 U. S. 606; *Ah Sin* v. *Wittman*, 198 U. S. 500, 504; *New York ex rel. Silz* v. *Hesterberg*, 211 U. S. 31; *Murphy* v. *California*, 225 U. S. 623. With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature, a notion foreign to our constitutional system."

5. A municipal regulation prohibiting the distribution of commercial advertising on the public streets entails no denial of the equal protection of the laws.

Both the District Judge (Appendix, *post*, pp. 47-48) and the majority of the Circuit Court of Appeals (see comment on their opinion in Judge FRANK's dissent, R., 49) were of the opinion that the regulation, § 318 of the Sanitary Code,

is discriminatory against the business man; that is to say, that it constitutes a denial of the equal protection of the laws. This position, however, is scarcely tenable.

The distinction between commercial advertisements and opinion or protest literature is not arbitrary or capricious; it is dictated by Federal and State constitutional guarantees of freedom of the press. *Matson Navigation Co.* v. *State Board*, 297 U. S. 441, 446 (1936); *Packer Corporation* v. *Utah, supra*, 285 U. S. 105, 109; *J. E. Raley & Bros.* v. *Richardson*, 264 U. S. 157, 160 (1924). The power in the City to enact the regulation implies the power "to classify the objects of legislation" and to make distinctions which have "a proper relation to the ordinance". *Fifth Avenue Coach Company* v. *City of New York, supra*, 221 U. S. 467, 484. See also, *Packer Corporation* v. *Utah, supra*, 285 U. S. 105, 108-111; *San Francisco Shopping News Co.* v. *City of South San Francisco, supra*, 69 F. (2d) 879, 887-889, 892; *Sierory* v. *Huntington Park, supra*, 111 Cal. App. 377, 295 Pac. 564. The distinction between commercial and non-commercial handbills having been recognized by the Courts, a similar recognition by a local regulation cannot constitute a denial of the equal protection of the laws.

It follows that a prohibitory ordinance or regulation which is so drawn as to be limited to commercial advertisements alone is not open to objection on constitutional grounds. Here is but another instance in which an individual's claim of deprivation of property without due process of law and of denial of equal protection of the laws must yield to the rights of the public to have its health, safety and welfare protected through the exercise of the police power.

POINT II.

Section 318 of the Sanitary Code prohibits only the distribution of commercial and business advertising matter, and is therefore constitutional.

Section 318 of the Sanitary Code has been precisely and carefully phrased; it is a regulation "narrowly drawn" to prevent a definite and specific evil. *Cantwell* v. *Connecticut*, 310 U. S. 296, 307, 311 (1940). The regulation—by its express terms—applies only to commercial advertising matter.* Its last sentence provides as follows:

> "This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter."

This is language that is plainly and easily understood. Moreover, even before this sentence was added in 1938 the New York Courts had made it plain that § 318 was intended to apply to advertising matter only. As applied to commercial advertising, its validity was expressly sustained in *People* v. *Horowitz, supra*, 27 N. Y. Cr. R. 237, 140 N. Y. Supp. 437. In 1921, it was held that § 318 in its then form

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* Exhaustive research has turned up no State decisions invalidating a prohibition of commercial advertisements under ordinances so drawn as to apply only to advertisements of such a nature. Cases have been found in which ordinances were held invalid, even as to commercial advertisements, for the reason that they were so broadly or indefinitely drawn as to be capable of application to protest or opinion literature. See Lindsay, *Council and Court: The Handbill Ordinances, 1889-1939*, 39 Mich. L. Rev. 561 (1941). We recognize the soundness of those decisions. Their irrelevance to the case at bar is demonstrated by the discussion of § 318 of the Sanitary Code which is contained in this Point.

was "never intended to prevent the lawful distribution of anything other than commercial and business advertising matter", and that it did not apply to the distribution of anti-Ku Klux Klan leaflets. *People* v. *Johnson*, 117 Misc. 133, 134-135 (Gen. Sess., N. Y. Co., 1921). Of especial pertinence is the more recent holding that notices and advertisements of a Communist mass meeting are not commercial advertisements within the scope of § 318 and could be freely distributed on the streets, even though the handbills set forth a price of admission to the meeting. *People* v. *Loring and Green* (Mag. Ct., N. Y. Co. 1933, unreported but noted in 1 I. J. A. Bull., No. 12, p. 2).

As a result of the *Johnson* and *Loring* cases, § 318 and its predecessors were recognized long before 1938 to apply only to commercial advertising in the very sense in which we use that term. In short, the addition in 1938 of the saving clause quoted above (*ante*, p. 27) neither added anything to nor detracted anything from the operation and effect of the regulation. Indeed, the addition of the clause was a mere enactment of the law as it already stood by force of well established judicial construction.

It will be noted that these New York decisions are in full accord with the *Lovell, Hague* and *Schneider* cases. Significantly enough, in a case in the New York Courts which arose after this Court had decided those three cases, the precise views expressed in this brief were adopted in a situation which presented the question of whether the street distribution of a department store advertisement could be prohibited under § 318. *People* v. *LaRollo*, 24 N. Y. Supp. (2d) 350 (Mag. Ct., N. Y. Co., 1940). The Court there held that § 318 was clearly constitutional as applied to such an

advertisement.* The essence of the Court's opinion is contained in the following quotation (p. 354):

> "The considerations which justify and require that the public interest in the cleanliness of its streets be made subordinate to the more important rights of its citizens freely to proclaim their ideas and principles, are not equally applicable where the individual distributor seeks merely to advertise and solicit patronage for his purely commercial enterprise."

The cited decisions of the New York Courts show that, in holding that the distribution of *non*-commercial literature could not be restrained under § 318, have consistently done so upon the ground that § 318 *was never intended to apply to such literature.* We therefore submit, first, that the purpose and scope of § 318 are not open to dispute; and, second, that § 318 is not so broad and all-embracing in its provisions and application as to be subject to condemnation upon the ground that it applies to literature of the kind which comes within the protection of the Constitution.

POINT III.

A valid prohibition against the street distribution of commercial advertising may not be evaded by the device of adding to a purely commercial handbill a gratuitous protest against the acts of public officials such as that involved in this case.

(1)

We come now to the question of whether handbill A (Pltf. Exh. A; R., 18A-18B) constitutes "commercial and

* This decision (which was not appealed) accords with the almost unanimous predictions of the law review writers. See, *e. g.*, 35 Ill. L. Rev. 90, 93-95 (1940); 24 Minn. L. Rev. 570 (1940); 12 So. Cal. L. Rev. 466, 468 (1939).

business advertising matter" within the meaning of § 318 of the Sanitary Code. As we have pointed out above, the District Court, though originally of the opinion that § 318 is unconstitutional and invalid on its face, in the final decree found only that the regulation is invalid as applied to handbill A (*ante*, p. 8); the majority of the Circuit Court of Appeals has held that handbill A is not a commercial handbill, that it is not "a mere subterfuge", and that § 318 cannot constitutionally be extended to it (*ante*, pp. 8-9).

Judge FRANK has reached precisely the opposite conclusion (*ante*, pp. 9-10). He opens his dissenting opinion as follows (R., 32):

> "To my mind, the majority opinion has reached the wrong conclusion primarily because it erroneously deals with this case as if it involved the attempted distribution of a single handbill of non-commercial or 'free speech' character, which contains some related and incidental commercial or business advertising. On that fallacious assumption of fact, the majority holds that the City ordinance, here before us, is unconstitutional in so far as it prohibits the distribution on City streets of such a non-commercial handbill. • • • I shall try to show the error of the majority's factual premise, since, if that fails, the principal ground of its decision vanishes."

He then goes on to demonstrate why handbill A is merely a commercial handbill (R., 32-42). His demonstration proceeds as follows:

Chrestensen had two distinct disputes with City officials. The first dispute arose when he sought to obtain a City pier at which to exhibit his submarine for profit and the Dock Commissioner refused; this resulted in his obtaining a state-owned pier. The second dispute arose when he asked the police for permission to distribute handbill No. 1 (R., 18C)—concededly a commercial handbill—on the City

streets, and the Police Commissioner denied this request because of § 318 of the Sanitary Code (R., 32-33).

Chrestensen then prepared handbill A (R., 18A-18B). The face of this handbill is the revision of handbill No. 1, stipulated on Chrestensen's behalf as consisting of commercial and advertising matter and containing no expression of opinion. The reverse side of the handbill consists only of a protest against the Dock Commissioner's refusal to allow Chrestensen a City pier for exhibition of his submarine (R., 33).

There was thus no inherent relation between the matter on the face of the handbill and the matter on the reverse side. The matter on the reverse side was an expression of opinion the distribution of which could not constitutionally be prevented; indeed, § 318 excepts it from its provisions, and the police expressly told Chrestensen he could freely distribute it separately. There was no reason why he could not do so; the two sides of the circular are unrelated in subject matter and could be divided without injury to either; they are separable and independent. The issue thus is narrowed to whether the separable matter on the face of the handbill is wholly commercial (R., 33-34).

That it is wholly commercial is manifest. Chrestensen's purpose or motive in proposing to distribute his original handbill, handbill No. 1,—for which he subsequently substituted handbill A—is admittedly wholly commercial. Pursuant to the presumption that, at least for a short time, a man's purpose or motive continues the same, Chrestensen's motive or purpose, when he substituted the revision for the original handbill, must be presumed to have continued the same. *Texas & N. O. R. Co.* v. *Ry. Clerks*, 281 U. S. 548, 559 (1930). That the protest matter gratuitously printed on the reverse side of the handbill had a quite dif-

ferent motive or purpose, does not overcome that presumption (R., 34-35).

There is no other evidence to overcome the presumption; on the contrary, the record reinforces it. There was no trial, and it must be assumed that had there been one, the statements contained in the stipulation of facts (R., 15-18) would have been conclusively proved and then found by the Court. These would have included findings as set forth in the stipulation of facts that the face of handbill A contains commercial and business advertising matter which solicits the public's patronage; that the reverse side contains, not advertising matter, but rather a public protest; that the police advised Chrestensen that the protest matter on the reverse side of the handbill could be freely distributed if separated from the matter on its face; that Chrestensen did not attempt to distribute the protest matter disassociated from the commercial-advertising matter, and that the restraints of the police on the distribution have and will result in a diminution of the number of persons paying admission fees so as to reduce Chrestensen's net profits by an amount in excess of $3,000. These facts leave no room for doubt that handbill A consists of a purely commercial handbill on its face and a separable "free speech" handbill on its reverse side (R., 35-36).

The record so made stands exactly as if Chrestensen had taken the witness stand and testified, without equivocation, that his intention with respect to the face of the handbill was wholly commercial as contrasted with his intention with regard to the matter on the reverse side, which was non-commercial. Moreover, the Court may take judicial notice of the motives which commonly operate upon human conduct in ascertaining Chrestensen's purpose—and the dominant purpose of business men "is to seek customers and make profits". Since Chrestensen is a business man, the

Court is "justified in concluding that, as his sole purpose in connection with the original handbill was unquestionably commercial, his purpose in trying to distribute the handbill found on the face of Exhibit [handbill] A was the same". His business is that of exhibiting his submarine for profit; the public was to be charged admission and that is why he wanted members of the public to appear; he does not exhibit his submarine for educational or propaganda purposes. Why, then, should the Court refuse to recognize that handbill A was commercial? (R., 37-38).

Decision in the instant case, says Judge FRANK, should not be impeded by the consideration that cases may arise in the future which present "some difficulty in ascertaining the primary purpose in distributing a handbill" and in drawing a line of demarcation between commercial and non-commercial matter (R., 39).

After pointing out there is no evidence of mixed motives as to the matter on the face of handbill A (R., 38), Judge FRANK concludes as follows (R., 40-41):

> "And especially in the instant case there need be no judicial anguish in drawing a line, and no occasion for psychological probings of Chrestensen's mental interior in order to ascertain what he was after, when endeavoring to distribute the matter on the face of Exhibit A: His original purpose, the contents of his stipulation of facts, his complaint that the enforcement of the City's ordinance diminished the number of persons paying fees for admission so as to cause him a loss of profits in excess of $3,000, are ample objective indicia of a commercial purpose with reference to the separable handbill printed on the front of Exhibit A."

We respectfully submit that this analysis of the stipulated facts is irrefutable. The conclusion is inescapable that Chrestensen's sole object in adding the protest material to

the back of his advertisement was to get around the prohibition of § 318, and thus to shift the cost of advertising his exhibition from his own pocket to that of the taxpayers, by compelling them at the very least to bear the expense of cleaning up the litter with which his activities would cover the city streets.

(2)

The majority of the Circuit Court of Appeals disagreed in principle with our view that the Courts should inquire into the circumstances surrounding the origin and purpose of hybrid handbills such as that involved here, and upon that basis determine whether they are or are not commercial in character. To do so, said Judge CLARK, would lead to "uncertainty, not to speak of unreality" (R., 30), and would necessitate the drawing of a line where none clearly appears.* For, he asks, "How much is 'primarily'?" and "* * * if intent and purpose must be measured, how can we say that plaintiff's [Chrestensen's] motives are only or primarily financial?" (R., 30, 31).

To this position there are two answers. In the first place, as Judge FRANK pointed out (R., 39), the making of such determinations and the drawing of such lines is inherent in the nature of the judicial process. Mr. Justice

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* We know of only one other case involving a hybrid handbill, *People* v. *Taylor*, *supra*, 33 Cal. App. (2d) 760, 85 Pac. (2d) 978. The handbill there involved was a four-page mimeograph published by the San Diego Communist Party Election Campaign Committee. It was almost wholly devoted to political discussion, but contained an advertisement of a non-profit bookstore selling books on related economic and political subjects. The handbill was thus clearly non-commercial in character, and its sole purpose, both in its text and through the advertisement, was to disseminate certain opinions or propaganda on matters of public concern. The Court had no difficulty in holding that the distribution of such a handbill was protected by the right of freedom of the press.

HOLMES frequently stated that where to draw such lines "is the question in pretty much everything worth arguing in the law". *Irwin* v. *Gavit*, 268 U. S. 161, 168 (1925); see also CARDOZO, *The Nature of the Judicial Process* (1921), p. 46; *The Paradoxes of Legal Science* (1928), p. 62. Judge CLARK might just as well criticize the legal concepts of "negligence", the "reasonable man", "restraint of trade" and many others deeply rooted in our jurisprudence. Courts of necessity are confronted with the problem of exploring the shadowy penumbra which lies between light and darkness. In the second place, in marking out the limits of the area protected by the guarantees of freedom of speech and of the press, this Court has often been required to draw lines of distinction in degree and quality. This was very recently the subject of opinion in *Bridges* v. *California*, 314 U. S. ——, 62 Sup. Ct. 190 (1941). There, after stating that this Court had set up the "*likelihood* of bringing about the substantive evil" * as the test of constitutionality, Mr. Justice BLACK said, "How much 'likelihood' is another question, '*a question of proximity and degree' that cannot be completely captured in a formula*" (62 Sup. Ct., at p. 193; italics ours). He further said that although under the "clear and present danger" † test, this Court has not yet fixed the standard for determining when a danger is clear or present, this language has nevertheless afforded "practical guidance" in a great variety of cases in which the scope of freedom of expression was in issue (*ibid.*). Obviously, a test that "cannot be completely captured in a formula", a working principle which affords only "practical guidance" in determining what is "extremely serious" with a "degree of imminence extremely high" call for the continuous drawing of lines in a field at least as difficult as

* *Gitlow* v. *New York*, 268 U. S. 652, 671 (1923).
† *Schenck* v. *United States*, 249 U. S. 47, 52 (1919).

determining what is "primarily financial" or what constitutes "commercial or business advertising matter". We therefore submit that Judge FRANK correctly concluded that handbill A is a commercial handbill.

Conclusion.

We submit that every consideration of policy requires a holding that a handbill such as this should not be given the same protection under the First and Fourteenth Amendments to the Constitution as is accorded to a protest or opinion handbill. The civil right of freedom of the press is a precious and valuable safeguard of our way of life. The Courts must accordingly be as vigilant to see that it is not abused, as they are to see that it is observed. Only thus will it be accorded the respect which is its due, and only thus will its usefulness and value, and perhaps even its very existence, be preserved.

The decision below has opened the way for the owner of every business enterprise in the country to flood the streets of our cities with commercial advertising under the guise of exercising the right of freedom of the press. Why should any business man spend large sums of money to purchase expensive advertising space in newspapers, in periodicals, or on billboards, when all he has to do is to add a protest against some act of a public official to his advertisement and hire a few people to distribute it to all comers on the busiest corners of the public streets? That this will create an administrative problem of the first magnitude for municipalities is bad enough. But what is worse, it will inevitably tend to decrease the regard in which our civil rights are held. For, to put it bluntly, Chrestensen has been permitted to exploit the Bill of Rights in order to saddle the cost of promoting his purely commercial enterprise upon the taxpayers of New York City. To permit such

exploitation is not to aid the cause of Civil Liberties. On the contrary, the public indignation which will arise should the streets of every city in the Union be littered with commercial advertising in the name of Civil Liberty will do far more harm to that cause than could possibly arise from a decision confining commercial advertisers to their traditional field of purchasing space on billboards or in the public press.

We therefore submit that the Court below erred on two counts on this branch of the case. First, in its interpretation of the facts, which led to the erroneous holding that handbill A is not "commercial and business advertising matter". Second, in its conception of policy, which led to the likewise erroneous holding that every effort should be made to hold that hybrid handbills such as this fall within the protection of the Constitutional guarantees. Both propositions merit the disapproval of this Court.

The decree of the Circuit Court of Appeals and of the District Court should be reversed, and the cause remanded with directions to dismiss the complaint upon the merits.

New York, N. Y., February 26, 1942.

Respectfully submitted,

WILLIAM C. CHANLER,
Corporation Counsel,
Counsel for Petitioner.

WILLIAM S. GAUD, JR.,
LEO BROWN,
WILLIAM B. TRAFFORD,
of Counsel.

APPENDIX.

Opinion of District Court on Motion for Injunction *Pendente Lite*, Aug. 26, 1940.

(Reported: 34 F. Supp. 596).

HULBERT, District Judge.

Plaintiff moves for an order enjoining, pendente lite, the defendant and members of the Police Department of New York City, acting by and under the direction of the defendant, from interfering with the distribution by plaintiff, or his agents, servants and employees, of handbills in the streets and on the sidewalks in the City of New York, including streets and sidewalks contiguous to and within Battery Park in the Borough of Manhattan, City of New York and from interfering with "sandwich men" employed by plaintiff on sidewalks adjacent to said park.

Jurisdiction is claimed to exist because this is a civil action to redress the deprivation, under color of state law, ordinance and regulation, of rights, privileges and immunities secured by the Constitution of the United States, and of rights secured by laws of the United States providing for equal rights of citizens of the United States and of all persons within the jurisdiction of the United States; that the amount in controversy exceeds $3,000, and that the suit arises under the Constitution and laws of the United States.

Plaintiff is a citizen of Florida, and the defendant is a citizen of New York.

Plaintiffs owns and maintains, for the purpose of exhibition to the public at a fixed admission fee, a former U. S. Navy submarine (S-49).

When he brought this vessel to New York he sought a berth for it at the City-Owned Battery wharf, from which

most pleasure vessels, operated for profit in our harbor, embark and discharge passengers. His application having been denied in accordance with the established policy of the municipality he then secured facilities at a State-Owned Barge Canal terminal, Pier 5 East River, claimed to be a much less desirable location, just above South Ferry.

In order to advise the public, attracted to the Battery by its accommodations for recreation and entertainment, and solicit patronage, plaintiff designed a circular or handbill which he intended to have distributed on the public thoroughfares and sidewalks in and adjacent to Battery Park, and submitted same to the New York City Police Department, and was informed that such practice would be a violation of the provisions of the New York Sanitary Code and the Health Department Rules relating specifically to parks.

Plaintiff then had printed on the reverse side of the circular or handbill, a protest against the action of the Dock Commissioner of the City of New York in refusing his application for docking facilities. The Police Commissioner has restrained its distribution.

The chief question presented for determination is whether the plaintiff's fundamental rights and liberties of freedom of speech and freedom of the press, protected by the First Amendment to the United States Constitution from infringement by Congress, and extended by the Fourteenth Amendment against invasion by State action, have been abridged.

It is conceded by the defendant that the distribution of a handbill, except on public park property, if confined to the criticism of the action of the Commissioner of Docks, would be permissible on the streets without police molesta-

tion. But, he contends, in combination with commercial advertising it loses its privileged status.

Section 318 of the Sanitary Code of the City of New York reads as follows: "No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letterbox therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter."

Article II, Section 6, of the Park Regulations of the City of New York reads as follows: "No person shall post any bill, placard, notice or other paper upon any structure, tree, rock, article or thing within any park, or upon any park street, or paint or affix thereon, in any other way, any advertisement, notice or exhortation. No person shall distribute, hand out, deliver, place, cast about or leave about any bill, billboard, ticket, handbill, card, placard, circular, pamphlet or display any flag, banner, transparency, target, sign, placard or any matter for advertising purposes, or operate any musical instrument or drum within any park or upon any park street, or cause any noise to be made for advertising purposes or the purpose of attracting attention to any exhibition, performance, show or other purpose, within any park or upon any park street. The placing, or using for any other purpose than reading of newspapers, or

other papers on the beaches or boardwalks, on the lawns or beaches of public parks is prohibited."

A public park has been defined by the New York Court of Appeals as "a piece of ground inclosed for purposes of pleasure, exercise, amusement or ornament." Perrin v. N. Y. C. R. R. Co., 36 N. Y. 120.

The public visit their parks to enjoy the beauties of nature, to rest, and sometimes to put aside their cares, or if to meditate upon them, to do so in solitude. However, counsel for the plaintiff has not pressed convincingly his application so far as the regulation pertaining to the Battery Park is concerned, and I find it to be without merit and dismiss it from further consideration.

Ordinarily the constitutionality of statutes is reserved to the appellate courts, and when the trial court undertakes to pass upon the question it must be satisfied of the unconstitutionality of the Act beyond a reasonable doubt before so deciding.

The United States Supreme Court in Lovell v. Griffin, 303 U. S. 444, 58 S. Ct. 666, 667, 82 L. Ed. 949, held unconstitutional an ordinance of the City of Griffin, Georgia, which provided:

"Section 1. That the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free, or whether same are being sold, within the limits of the City of Griffin, without first obtaining written permission from the City Manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin.

"Section 2. The Chief of Police of the City of Griffin and the police force of the City of Griffin are hereby re-

quired and directed to suppress the same and to abate any nuisance as is described in the first section of this ordinance."

In delivering the opinion of the court, Mr. Chief Justice Hughes said (page 451 of 303 U. S., page 668 of 58 S. Ct., 82 L. Ed. 949):

"The ordinance is not limited to 'literature' that is obscene or offensive to public morals or that advocates unlawful conduct. There is no suggestion that the pamphlet and magazine distributed in the instant case were of that character. The ordinance embraces 'literature' in the widest sense.

"The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the city manager.

"We think that the ordinance is invalid on its face."

Subsequently state courts in four different states upheld ordinances which prohibited the distribution of handbills, or of house-to-house solicitation, each attempting to distinguish the Lovell case, supra; in City of Milwaukee v. Snyder, 230 Wis. 131, 283 N. W. 301, upon the ground that the ordinance was aimed at preventing the littering of the streets; in Com. of Massachusetts v. Nicols, 301 Mass. 584,

18 N. E. 2d 166, because the ordinance applied to only a part of the City of Worcester in State (Town of Irvington, N. J.) v. Schneider, 121 N. J. L. 542, 3 A. 2d 609, because the ordinance was aimed at canvassing or soliciting; and in People of California v. Kim Young, 33 Cal. App. 2d Supp. 747, 85 P. 2d 231, because the ordinance did not prohibit distribution of what the court characterized as "commercial advertising" in all parts of the City of Los Angeles.

All four of those cases were reversed and each ordinance held unconstitutional by the United States Supreme Court. Schneider v. State (Town of Irvington), 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155.

No distinction was made in any of these cases between commercial and non-commercial circulars or handbills.

The defendant urges that Section 318 of the Sanitary Code is enforced against "commercial" handbills to avoid littering of the streets.

It is less likely that the distribution of non-commercial handbills will not result in littering the streets?

It is said in 5 University Chicago Law Review 675, 676 (1938): "The value of such a distinction is open to doubt. What is news of general nature as compared with advertising matter? Is the announcement of a political meeting matter of general nature? A New Jersey court [Almassi v. City of Newark, 150 A. 217, 8 N. J. Misc. 420] held it was advertising matter only. In a recent Massachusetts decision [Commonwealth v. Kimball, 299 Mass. 353, 13 N. E. 2d 18, 114 A. L. R. 1440] pamphlets advocating a labor union were held advertising matter. On the other hand, a Michigan court [People v. Armstrong, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578] held that an ordinance was not reasonable if it included in its prohibition

the circulating of 'an invitation to a moral and Christian assembly of people gathered together for the public good.' "

In the final disposition of the four cases above referred to, Mr. Justice Roberts, writing for the court said, (308 U. S. page 162 60 S. Ct. page 151, 84 L. Ed. 155): "The motive of the legislation under attack [the Los Angeles, Milwaukee, and the Worcester ordinances] is held by the courts below to be the prevention of littering of the streets and, although the alleged offenders were not charged with themselves scattering paper in the streets, their convictions were sustained upon the theory that distribution by them encouraged or resulted in such littering. We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets, as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."

A city ordinance of the suggested character (merely prohibiting the casting of handbills into the street) has been upheld as reasonable and valid in City of Philadelphia v. Brabender, 201 Pa. 574, 51 A. 374, 58 A. L. R. 220.

People v. Taylor, 33 Cal. App. 2d Supp. 760, 85 P. 2d 978, 979, decided December 31, 1938, is quite in point with the case at bar: The defendants were charged with a violation of Ordinance 10731 of the City of San Diego and after

pleas of not guilty but before trial the case was dismissed and the people appealed. Haines, Presiding Judge, said:

"We think that the judgment must be sustained. Though the case was not tried upon the facts there is in the record what the parties stipulate is a copy of the matter circulated. It is a mimeographed publication of a radical but not incendiary nature, mainly devoted to political discussion but containing certain advertising matter."

* * *

"We do not question the right of the Council to inhibit the defacing of property by affixing to it posters, circulars or notices, nor do we question the council's right to forbid the depositing upon sidewalks, streets or other public places, or for that matter the unauthorized depositing on private property of dodgers, notices, circulars or other matter having a tendency to create an accumulation of rubbish. Such inhibitions are manifestly proper uses of the police power and have often been so held. [Citing Cases.] It is true that a portion of the San Diego ordinance under review is directed against that evil. This, however, is not the portion of the San Diego ordinance under which the charge before us is laid. What is charged is a mere personal distribution of advertising matter to pedestrians on a public street and to persons in another public place.

"There is no charge that such matter was forced upon persons not willing to receive the same or that there was anything in the distribution tending to disturb the peace or public order or to cause any littering of the streets or of any public place. The attempt to prohibit the mere handing of advertising matter to persons on the streets or in other public places has often been held to be an unlawful and unwarranted invasion of private rights and therefore

to be beyond any legitimate exercise of the police power, and we are in accord with that view. [Citing Cases.]"

Indeed, cases in our own state have come into step with the more modern trend of constitutional interpretation since 1938. People on Complaint of Mullaly v. Banks, City Magistrates Court of New York, Borough of Manhattan, First District, July 20, 1938, 168 Misc. 515, 6 N. Y. S. 2d 41; People ex rel. Gordon v. McDermott, Supreme Court, Albany County, 169 Misc. 743, 9 N. Y. S. 2d 795. Compare People v. Armstrong, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578; City of Chicago v. Schultz, 341 Ill. 208, 173 N. E. 276; Ex parte Pierce, 127 Tex. Cr. R. 35, 75 S. W. 2d 264.

It is argued on behalf of defendant that the plaintiff has sought to manufacture a case which, under the cloak of civil liberty, would "permit him to line his own pockets through the medium of unlawful advertising at the expense of the people of the City of New York," and it is urged that by reason of the absence of a deprivation of civil right this Court is without jurisdiction under Section 24 (14) of the Judicial Code, Section 41 (14), Title 28 U. S. C., 28 U. S. C. A. § 41 (14).

The plaintiff claims loss of profits because he has been compelled to berth his vessel at a less favorable location. He may show the location to be less favorable, but it cannot be assumed that the Dock Commissioner acted from improper motives when he carried out an administrative policy. However, the plaintiff has been deprived of a civil right in distributing an informative circular concerning the location of his exhibit and soliciting patronage. The ordinance is clearly discriminatory against the business man while affording protection to persons, distributing non-com-

mercial handbills, whose convictions and efforts might be subversive to the welfare of the government.

I hold Section 318 of the Sanitary Code of the City of New York to be invalid.

With respect to the "sandwich men", employees of the plaintiff, there has been a determination against the police commissioner in the case of Walters v. Valentine, 172 Misc. 264, 12 N. Y. S. 2d 612, in the Supreme Court, New York County, Special Term, Part I, McCook, J., April 26, 1939.

Motion granted to extent thus indicated. Settle order on notice.

Lawyers Press, Inc., 165 William St., N. Y. C.; 'Phone: BEekman 3-2300

Supreme Court of the United States

No. 707. October Term, 1941.

LEWIS J. VALENTINE, individually and as Police Commissioner of the City of New York,

Petitioner,

against

F. J. CHRESTENSEN.

PETITIONER'S MEMORANDUM SUPPORTING THE PROPOSITION THAT THIS CAUSE IS NOT MOOT.

April 2, 1942.

WILLIAM C. CHANLER,
Corporation Counsel,
Counsel for Petitioner.

LEO BROWN,
of Counsel.

Table of Cases Cited.

Statute Cited

Supreme Court of the United States

No. 707. October Term, 1941.

LEWIS J. VALENTINE, individually and as Police Commissioner of the City of New York,

Petitioner,

against

F. J. CHRESTENSEN.

PETITIONER'S MEMORANDUM SUPPORTING THE PROPOSITION THAT THIS CAUSE IS NOT MOOT.

During the course of the argument of this cause before this Court on March 31, 1942, in answer to questions from the Court, it developed that respondent and his submarine were not now in the City of New York, but were at present in the City of Albany, New York. The question arose as to whether this fact rendered the present controversy moot. We submit that the controversy is not moot, and requires determination by this Court upon the merits.*

(a)

The final decree of injunction in this case provides in part as follows (R., pp. 9-10):

> "Ordered, adjudged and decreed that Section 318 of the Sanitary Code * * * insofar as it prohibits the distribution of handbills containing commercial

* Mr. Walter W. Land, counsel for the respondent, authorizes us to state that he joins in this memorandum.

> or business advertising matter upon such streets, sidewalks and public places of New York City * * * is unconstitutional and invalid as applied to the distribution *by plaintiff or his agents* upon said streets, sidewalks and public places of handbills, *such as Plaintiff's Exhibit A in this cause*, and the defendant and members of the Police Department *are hereby perpetually enjoined from interfering with said distribution of handbills such as Plaintiff's Exhibit A, by the plaintiff or his agents upon said streets*, * * *." (Italics ours.)

It is apparent from a mere reading of this final decree that its scope and effectiveness are wholly unrelated to the whereabouts of respondent's submarine. Respondent himself, or through his agents, is given the perpetual right to distribute handbills "such as Plaintiff's Exhibit A" anywhere on the streets of the City of New York at any time, notwithstanding the provisions of § 318 of the Sanitary Code of the City of New York, and petitioner is perpetually restrained from interfering with such distribution.

The submarine is now in Albany. Respondent's counsel stated on the argument that respondent would in all probability seek to exhibit it in New York City again, and to distribute handbills in connection therewith. Certainly, under this decree he has a continuing right to do so, and certainly, if our position in this case is correct, that is a continuing right protected by this decree to violate § 318 of the Sanitary Code,

But quite apart from the whereabouts of respondent's submarine, respondent could distribute handbills on the streets of New York City right now under this decree, informing persons in New York that the submarine may be seen in Albany at present, or announcing the date of its future return to New York.

Nor is the decree limited even to a handbill advertising respondent's submarine. He has an absolute and continuing right under this decree to distribute any handbill "such as" handbill A, either by himself or through his agents. Thus, Chrestensen now has the power, if he should so desire, to set himself up in the advertising business and, through his agents, flood the streets of New York with handbills modeled in form upon handbill A, advertising any other product which he may obtain as a client, in total disregard of § 318 of the Sanitary Code.

It is thus apparent that the final decree by its terms is still continuing and effective, and, unless reversed, will so continue as long as respondent is alive. We have never before heard it suggested that a perpetual injunction lost its effectiveness merely because, for the moment, the party benefited by the injunction happened not to be taking full advantage of his rights.

It is therefore unnecessary to consider the bearing upon this question of the obvious fact that until reversed, the existing decision of the Circuit Court of Appeals would effectively prevent public officials from interfering with the street distribution of such handbills as handbill A, probably throughout the nation, and certainly, throughout the territory embraced by the Second Circuit. *Cf., Boise City Irr. & Land Co.* v. *Clark*, 131 Fed. 415, 418-419 (C. C. A., 9th, 1904), cited with approval in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 515, 516 (1911).

Since it is clear that the constitutional validity of § 318 of the Sanitary Code must still be determined here, it seems to us that it requires but little citation of authority to demonstrate that the controversy has not become moot. We respectfully refer the Court to the following cases: *Federal Trade Commission* v. *Goodyear Tire and Rubber Co.*, 304

U. S. 257, 260 (1938); *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 307-310 (1897); *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 514-516 (1911); *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433, 452 (1911); *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 413-414 (1934); *Leonard & Leonard* v. *Earle*, 279 U. S. 392, 398 (1929); *McGrain* v. *Daugherty*, 273 U. S. 135, 181-182 (1927).

(b)

The situation in this case is not one where respondent expected to exhibit his submarine in New York City for a fixed and definite period of time, and desired to have his right to distribute his handbills on the City streets determined only for that period. What he sought and obtained here was an adjudication that the regulation involved was unconstitutional and invalid, and that he could whenever he desired distribute handbills such as handbill A upon the City streets free from restraint. Thus, it becomes obvious that this controversy is vastly different from one in which it is sought to secure the right to vote at an election when the date of the election has already passed by, *Mills* v. *Green*, 159 U. S. 651 (1895); *Jones* v. *Montague*, 194 U. S. 147 (1904); or in which title to public office is involved and the term of office fixed by law has expired, *Tennessee* v. *Condon*, 189 U. S. 64 (1903); *Alejandrio* v. *Quezon*, 271 U. S. 528 (1926). Neither is it at all similar to a suit in which a permit sought to be canceled has expired by its terms, *Security Life Ins. Co.* v. *Prewitt*, 200 U. S. 446 (1905); or in which an agreement has been rendered ineffective by reason of war, *United States* v. *Hamburg-American Co.*, 239 U. S. 466 (1916); or in which the statute governing the cause has been repealed, amended or rendered ineffective, *Berry* v. *Davis*,

242 U. S. 469 (1917); *Board of Public Utility Commissioners* v. *Compania General*, 249 U. S. 425 (1919); *Atherton Mills* v. *Johnston*, 259 U. S. 13 (1922); or in which the property that constituted the subject matter of the suit has been conveyed away, *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360 (1919); *Heitmiller* v. *Stokes*, 256 U. S. 359 (1921); or in which the act sought to be compelled has been performed, *Brownlow* v. *Schwartz*, 261 U. S. 216 (1923).

It follows that the controversy is not moot, and should be finally determined by this Court.

New York, N. Y., April 2, 1942.

Respectfully submitted,

WILLIAM C. CHANLER,
Corporation Counsel,
Counsel for Petitioner.

LEO BROWN,
of Counsel.

LAWYERS PRESS, INC., 165 William St., N. Y. C.; 'Phone: BEekman 3-2300

Supreme Court of the United States

OCTOBER TERM, 1941

LEWIS J. VALENTINE, individually and as Police Commissioner of The City of New York,
Petitioner,
against
F. J. CHRESTENSEN,
Respondent.
No. 707

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT

March 5, 1942.

WALTER W. LAND,
Attorney for Respondent.

WINTHROP, STIMSON, PUTNAM & ROBERTS,
Of Counsel.

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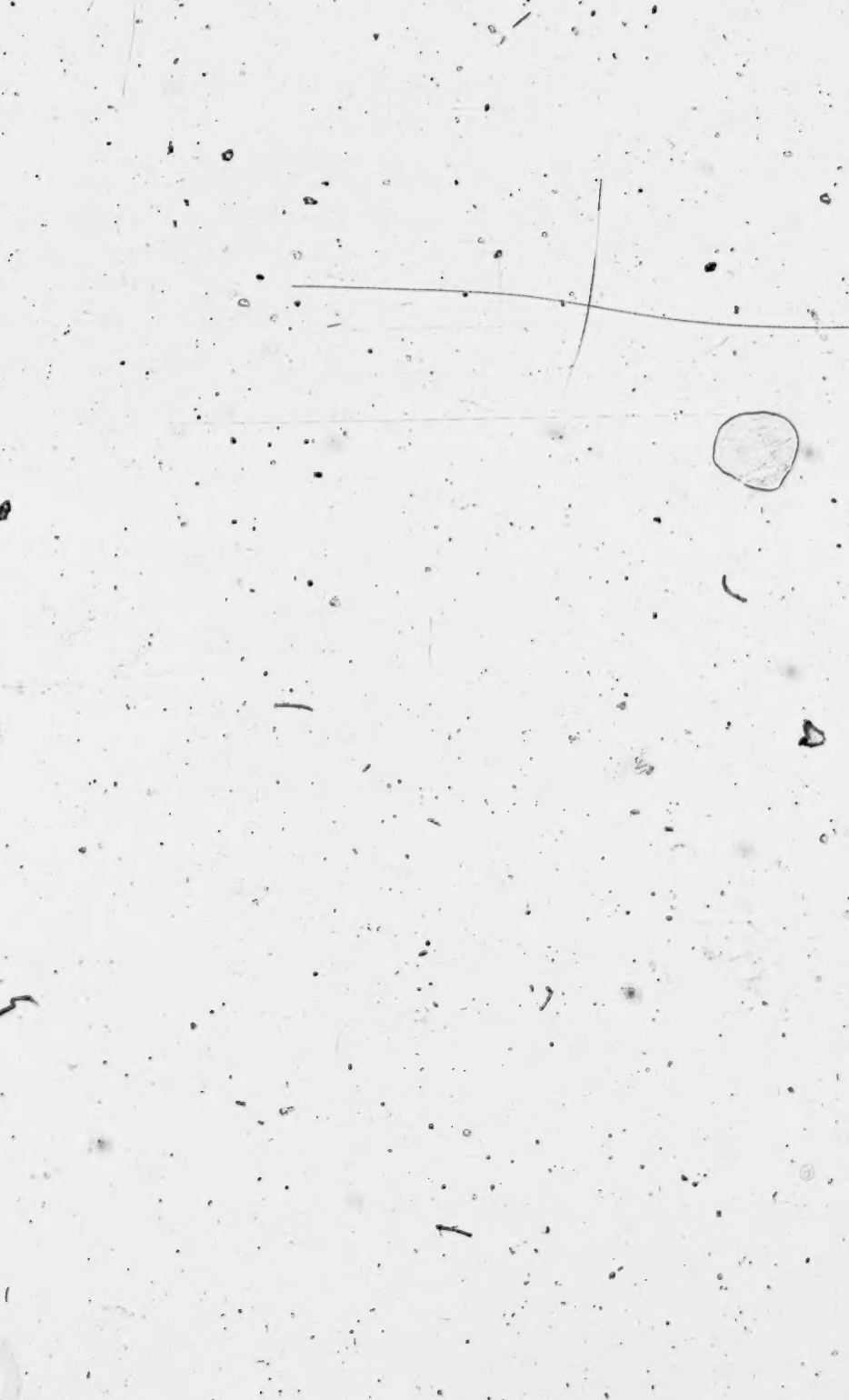

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

LEWIS J. VALENTINE, individually and as Police Commissioner of The City of New York,

Petitioner,

against

F. J. CHRESTENSEN,

Respondent.

No. 707

BRIEF FOR RESPONDENT

Statement of Facts

The respondent, F. J. Chrestensen, is the owner and exhibitor of former United States Navy Submarine S-49. He brought this submarine to New York City in the summer of 1940 for exhibition. The Commissioner of Docks of New York City refused to rent to respondent docking facilities at any municipal docks and he was therefore compelled to rent less desirable docking facilities from the State of New York at Pier 5 in the East River.

Respondent then had printed a handbill advertising the submarine (Deft. Exh. 1; R., 18C), which handbill is hereinafter referred to as "handbill No. 1". He was, however, informed by the New York City Police authorities that the distribution of handbill No. 1 on the public streets of New York City would violate sec. 318 of its Sanitary Code, but that he could freely distribute handbills containing "information or a public protest" (R., 17).

Respondent thereupon followed the suggestion of the police authorities, as he understood it, and had printed a second handbill, which is hereinafter referred to as "handbill A". (Pltf. Exh. A; R., 18A-18B). Handbill A was printed on both sides. One side contained a protest against the dictatorial conduct of the Commissioner of Docks of New York City in refusing to rent to respondent any city owned docks at Battery Park or Pier 1A.

The opposite side of handbill A contained a diagram showing the location of the submarine, a picture of the submarine and certain information concerning the submarine which, respondent's experience had shown, the general public was interested in knowing. Respondent removed from the handbill all data which he felt could be considered as advertising. All references to the sale of tickets were removed. The statement "Popular Prices, adults 25¢, children 15¢" disappeared. All reference to guide service was deleted. The insistent demands to "See" the described points of interest were replaced by the simple informative statement that "Submarine S-49 contains" a torpedo compartment, sleeping quarters, etc.; and the invitation to see how men live in a hell diver vanished completely.

Respondent then took handbill A to the police authorities for their approval. This time he was told that the distribution of handbill A would be restrained but that he could freely distribute a handbill containing the protest, but not the data appearing on the opposite side (R., 17-18). Respondent, believing that the police authorities were acting arbitrarily, then consulted counsel as to his rights and instituted suit in the United States Courts for relief.

The only handbill involved in this case is handbill A and respondent acted in absolute good faith in preparing it in accordance with the suggestion, as he understood it, made to him by the police authorities that he could freely distribute handbills containing only information and public protest. Petitioner's insinuations now that the protest was added gratuitously as a device to circumvent the city ordinance are, therefore, highly resented by respondent. The

reason he did not come back with a third handbill is because he felt that no matter how many handbills he had printed the police authorities would still refuse permission to distribute them.

The Opinions of the Courts Below

Respondent instituted suit in the United States District Court for the Southern District of New York to perpetually enjoin petitioner from interfering with the distribution of handbill A (Pltf. Exh. A; R., 18A-18B) to persons willing to receive the same on the public streets and sidewalks in The City of New York and at the same time respondent made a motion for an injunction *pendente lite*. Jurisdiction is founded upon diversity of citizenship of the parties, there being more than $3,000 involved, and also upon the deprivation of constitutional rights. 28 U. S. C. A. sec. 41 (1) and (14). The District Court granted respondent's motion for an injunction *pendente lite* and held the handbill ordinance, Sec. 318 of the Sanitary Code of The City of New York (R., 16) unconstitutional and invalid on its face. The Court's decision is reported in 34 Fed. Supp. 596 (1940) and is reprinted as an appendix to petitioner's brief. It was thereupon pointed out to the District Court by the petitioner that this decision went beyond the scope of the present case and accordingly upon the final submission, the final decree (R., 9-10) granting a permanent injunction was narrowed to the facts of the case and the handbill regulation was held unconstitutional as applied to handbill A.

On appeal to the Circuit Court of Appeals, that Court affirmed the District Court (R., 21-32). Clark, Cir. J. (with whom Swan, Cir. J. concurred), wrote the prevailing opinion in which it was held that the handbill ordinance was unconstitutional as applied to handbill A, containing a combination of protest and advertisement. Frank, Cir. J., wrote a dissenting opinion (R., 32-51). 122 F. (2d) 511.

Issue Presented

The primary question presented is whether section 318 of the Sanitary Code of The City of New York is unconstitutional as applied to handbill A, in absolutely prohibiting as distinguished from reasonably regulating the distribution of a handbill containing in part a protest against the action of the Commissioner of Docks and in part information about a submarine and advertising.

POINT I

Section 318 of the Sanitary Code of The City of New York is invalid and unconstitutional as applied to handbill A because it unlawfully discriminates between commercial and non-commercial advertising handbills.

(1)

The City of New York has had in force ordinances prohibiting the distribution of handbills since approximately the beginning of the present century. Prior to 1938, however, this series of ordinances contained no express distinction between commercial and non-commercial handbills. In 1938, at about the time of this Court's decision in *Lovell v. City of Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949, the ordinance was transmuted into the present health department regulation, sec. 318 of the Sanitary Code, and the important final sentence was added for the first time: "This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter."

Petitioner concedes that without a limitation such as this last sentence affords the ordinance would clearly be invalid and unconstitutional in view of this Court's decisions since 1938 (Petitioner's brief, p. 27, footnote).

The avowed purpose of the handbill ordinance is to protect the public health by preventing the littering of the streets. Petitioner divides handbills and circulars into three classes: (a) non-commercial literature, (b) non-commercial advertisements, and (c) commercial advertisements. He admits it is no longer possible to absolutely prohibit the distribution of handbills containing non-commercial literature and he concedes that he may no longer suppress non-commerical advertisements (Petitioner's brief, p. 6). It is only commercial advertisements which petitioner seeks to ban. We contend, on the contrary, that handbills containing commerical advertisements may be reasonably regulated but not prohibited.

In *Lovell* v. *City of Griffin*, supra, this Court, through Mr. Chief Justice Hughes, intimated that ordinances which reasonably regulated the distribution of handbills to prevent the misuse or littering of the streets would be sustained, and no distinction was made as to the nature of the handbill, so presumably all types of handbills could be reasonably regulated (303 U. S. 441, 451). If the City of New York, therefore, is sincere that the purpose of the ordinance is to prevent street littering, it should have enacted a new ordinance in 1938 placing reasonable regulations upon the distribution of all handbills, commercial and non-commercial, so that no littering at all would result.

Instead of enacting such a regulation, however, the City of New York in 1938 attempted to patch up its former ordinance by adding the final sentence making clear that only commercial and business advertising matter was prohibited.

Petitioner has, we submit, thus caused himself to be maneuvered into the untenable position where he must admit that under the patched-up present city ordinance, handbills containing non-commercial advertisements may be distributed without restraint, regardless of how much the streets are littered; but that commercial handbills may not be distributed at all, even though no littering would result from their distribution. This, we submit, constitutes an unlawful discrimination.

Petitioner, in order to win this case, must sustain his proposition that a valid distinction can be drawn between non-commercial advertisements and commercial advertisements and that commercial advertisements can be absolutely prohibited. He admits (Petitioner's brief, p. 12) that unless he can uphold that distinction his other points are futile. He has attempted to make this distinction between commercial advertising and other advertising before—and has failed.

In *Walters* v. *Valentine*, 172 Misc. 264, 12 N. Y. S. (2d) 612 (Sup. Ct., N. Y. Co. 1939) a regulation was before the court which prohibited advertising by sandwich men but excepted pickets. Justice McCook refused to follow the City's attempt to distinguish between commercial and non-commercial advertising and held the regulation invalid and advised the Corporation Counsel that the reasonable regulation of both sandwich men and pickets was the solution to the problem.

Similarly the petitioner urged before the United States District Court and the Circuit Court of Appeals in the case at bar that a distinction should be made between commercial advertising and other advertising, but both Judge Hulbert and Judge Clark declined to follow this point and both courts pointed out that non-commercial handbills result in just as much, or more, littering than commercial handbills.*

Petitioner has stated (Petitioner's brief, p. 27, footnote) that he has been unable to find any decision which has invalidated an ordinance that only prohibited the distribution of commercial advertisements. We wish to call the Court's attention to a very significant decision of an Oregon court which is exactly in point on this question. This is the case of *Loycar* v. *City of Portland*, decided by Judge Brand of

* *People* v. *LaRollo*, 24 N. Y. S. (2d) 350 (Mag. Ct., N. Y. City, 1940) on which petitioner relies as his only decision holding that commercial handbills may be banned, was a decision he obtained in the New York City Magistrate's Court after Judge Hulbert had held the ordinance invalid on its face and had granted a temporary injunction against its enforcement.

the Circuit Court of Oregon, County of Multnomah, on September 23, 1940, almost simultaneously with the decision of the United States District Court in the case at bar. The decision is unreported so far as we can ascertain and for that reason is quoted herein more fully than would otherwise be done. In a 39 page opinion which carefully considered the problem of commercial advertising circulars, it was held that the ordinance of the City of Portland, Oregon was unconstitutional. A straight commercial circular, advertising a garage and auto motor service, was involved and had been distributed on the streets of Portland in violation of the ordinance which absolutely prohibited the distribution of "any advertising matter upon the streets or public places of the City of Portland."

Upon the urging of the City Attorney that this ordinance applied only to commercial advertising circulars Judge Brand stated: "I shall assume, without now deciding, that the Portland ordinance may be so construed as to apply only to commercial advertising of commercial products." Later in the opinion he set forth the reasons why it seemed clear that the City's position was correct that the ordinance was aimed only at commercial advertising matter. He then phrased the issue as follows: "Our inquiry relates to the asserted power to absolutely prohibit commercial street advertisements of harmless goods and useful services."

In holding that the distribution of commercial advertising handbills could be reasonably regulated but that an ordinance absolutely prohibiting their distribution to persons willing to receive the handbills was unconstitutional, Judge Brand stated:

> "While the preservation of free speech upon industrial and political matters is of essential importance, and the rights of minorities must always be maintained, still it appears to me that the simple interests of the great body of manufacturers, retailers, farmers, artisans, and laborers who constitute the heart of democratic America, and perhaps the majority of its people, are equally im-

portant. Such simple interests of people to make known to the world their commercial desires, whether to buy, sell or serve, should receive essentially similar constitutional treatment to the extent that they should not be placed by Judicial action in an inferior position as persons under the bill of rights.

"In my opinion, having regard to the leaflet cases, [of the United States Supreme Court] the court must hold that there is a constitutional right on the part of commercial advertisers to deliver literature upon the public streets to persons willing to receive it. The expense and inconvenience involved in removing discarded leaflets from streets does not involve such present danger to the peace, health or safety of the state as would warrant the abridging of the individual liberties of the citizen. In so holding we are but applying the mandate to 'weigh the circumstances and appraise the substantiality of the reasons advanced in support of the regulation.'

"What has been said must not be taken as suggesting in any way that the constitutional right of commercial advertising on the streets is not subject to broad regulation by the legislative arm under the police power. I have merely indicated that the specific constitutional right established in the leaflet cases to deliver literature containing information or opinion to persons on the street *who are willing to receive the same* extends to and includes commercial advertisers."

* * * *

"Since all others have the constitutional right to distribute literature on the streets to persons who are willing to receive it, I am of the opinion that the same constitutional right must be accorded to commercial advertisers. They may deliver commercial advertising, therefore, to persons on the streets who are willing to receive the same and who, if they do receive such literature, may well be held responsible for deliberately littering the streets thereafter. In my opinion, such a conclusion is enforced, first, by the authority of the leaflet cases, and, second, by the rejection of the proposed doctrine of constitutional zones of sanctity."

Here, then, is a decision squarely in point holding that an ordinance which only prohibited the distribution of commercial advertising handbills is unconstitutional. We respectfully submit that the reasoning of Judge Brand should be sustained by this Court and that his decision is in keeping with this Court's decisions in the leaflet cases.

In *Lovell* v. *City of Griffin*, supra, Mr. Chief Justice Hughes said (303 U. S. at 451, 452):

> "The ordinance is not limited to 'literature' that is obscene or offensive to public morals or that advocates unlawful conduct. There is no suggestion that the pamphlet and magazine distributed in the instant case were of that character. The ordinance embraces 'literature' in the widest sense.
>
> "The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the city manager.
>
> "We think that the ordinance is invalid on its face."
>
> * * * * *
>
> "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."

This Court in the *Lovell* case did not deny a municipality the right to regulate the distribution of handbills. On the contrary, it indicated that the distribution of pamphlets might be regulated in various ways. In listing the types of restrictions which could lawfully be imposed upon the distribution of circulars, however, no distinction was made between commercial and non-commercial circulars.

In 1939, this Court held the Jersey City, New Jersey ordinance unconstitutional in *Hague* v. *C. I. O.*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423. In an action to enjoin, among other things, interference with the distribution of labor union circulars and handbills Mr. Justice Roberts, writing for the Court said: "The ordinance absolutely prohibiting such distribution is void under our decision in *Lovell* v. *City of Griffin*, supra, and petitioners so concede." 307 U. S., at 518. Based upon this Court's decision, the final decree upon mandate of the United States District Court for the District of New Jersey, dated June 19, 1940, in the *Hague* case, restrained the officials of Jersey City, New Jersey, from enforcing against the plaintiffs the provisions of their ordinance as to (1) the distribution of circulars, (2) the sale of labor union literature, "whether for profit or otherwise", and (3) the displaying of placards or signs.

Of the four cases this Court reviewed in *Schneider* v. *State (Town of Irvington)*, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155, the case of *Kim Young* v. *California*, 33 Cal. App. (2d) 747, 85 P. (2d) 231 comes the closest to the facts of the case at bar. The handbill involved in that case advertised a meeting under the auspices of "Friends Lincoln Brigade" at which the War in Spain was to be discussed. The handbills contained the words "Admission 25¢ and 50¢". This Court, through Mr. Justice Roberts (308 U. S. at 155, n. 3) stated as to this:

> "On the hand-bill were the words 'Admission 25¢ and 50¢.' The Superior Court adverted to these and said: 'Whatever traffic in ideas the Friends Lincoln Brigade may have planned for the meeting, the cards themselves seem to fall within the classification of commercial advertising rather than the expression of one's views. But if this be so, our conclusion is not thereby changed.' "

On the appeal before this Court in *Kim Young* v. *California*, one of the three points in the brief of appellee, California, was devoted exclusively to the argument that the handbill

in question was a commercial advertisement, and that therefore the constitutional guarantees did not apply. In fact that brief contained many of the same arguments now urged by petitioner. None the less, this Court, in holding the California ordinance invalid, made no distinction between commercial and non-commercial "information or opinion" which may be distributed in the form of handbills. If this Court desired to exclude commercial street advertising, delivered to one willing to receive it, from constitutional protection, a few words would have indicated that desire.

People v. *Taylor*, 33 Cal. App. (2d) 760, 85 P. (2d) 978, decided after *Lovell* v. *City of Griffin*, supra, is just like the case at bar in that it also dealt with a handbill containing a combination of commercial advertising and non-commercial data. The ordinance was held invalid for violating freedom of speech and press. Petitioner attempts to distinguish this case (Petitioner's brief, p. 34, footnote) on the ground that it was devoted mainly to political discussion although containing an advertisement of a bookstore, and that since it was not distributed *primarily* for commercial advertising purposes, its distribution should be permitted. We wish to point out that the handbill in that case, in addition to the commercial advertisement of the book store, also contained a commercial advertisement of a daily paper, Peoples World, together with a schedule of its subscription rates, and a commercial advertisement of several pamphlets and of some ten books with the prices of each and a laudatory descriptive paragraph of each. The court characterized the circular as a "publication of a radical but not incendiary nature, mainly devoted to political discussion but containing certain ad-advertising matter." The court held without equivocation that an ordinance absolutely prohibiting the distribution of advertising matter was unconstitutional. After stating that the city could inhibit the defacing of property, the court expressed its condemnation of the ordinance as follows:

> "This, however, is not the portion of the San Diego ordinance under which the charge before us is

> laid. What is charged is a mere personal distribution of advertising matter to pedestrians on a public street and to persons in another public place. There is no charge that such matter was forced upon persons not willing to receive the same or that there was anything in the distribution tending to disturb the peace or public order or to cause any littering of the streets or of any public place. The attempt to prohibit the mere handing of advertising matter to persons on the streets or in other public places has often been held to be an unlawful and unwarranted invasion of private rights and therefore to be beyond any legitimate exercise of the police power, and we are in accord with that view. People *v.* Armstrong, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578; Chicago *v.* Schultz, 341 Ill. 208, 173 N. E. 276; People *v.* Johnson, 117 Misc. 133, 191 N. Y. S. 750; Ex parte Pierce, 127 Tex. Cr. R. 35, 75 S. W. 2d 264. See also Lovell *v.* Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949.'

We submit, therefore, that the conclusions reached by Judge Hulbert and Judge Clark below and by the courts in *Loyear* v. *City of Portland*, supra, and *People* v. *Taylor*, supra, are sound, that they are consistent with the handbill decisions of this court, and that this court should confirm that the distribution of commercial advertising handbills may be reasonably regulated but not absolutely prohibited.*

Where, then, does petitioner's position leave him? He is forced to concede that the distribution of non-commercial literature can not be prohibited. He admits that since 1938 he can no longer absolutely prohibit the distribution of non-commercial advertising. Reluctantly, he even takes the last

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* A number of cases in the past have held city ordinances invalid which absolutely prohibited the distribution of handbills as distinguished from reasonably regulating them. *People* v. *Armstrong*, 73 Mich. 288, 41 N. W. 275; *City of Chicago* v. *Schultz*, 341 Ill. 208, 173 N. E. 276; *Ex Parte Pierce*, 127 Tex. Crim. App. 35. See also *People* v. *Banks*, 168 Misc. 515, 6 N. Y. S. (2d) 41; *People* v. *Finkelstein*, 170 Misc. 188, 9 N. Y. S. (2d) 941. For other authorities suggesting that regulation is the solution, see 28 Geo. L. J. 649; 8 Geo. Wash. L. Rev. 866, 868; 53 Harv. L. Rev. 487, 488.

step and agrees that circulars containing commercial advertising may not be absolutely prohibited, provided the circular is not distributed primarily for commercial advertising purposes. Instead of stubbornly trying to hold on to a patched-up city ordinance, why does he not have enacted a new handbill ordinance in keeping with the recent decisions of this court and make reasonable regulations for all handbill distribution. That is the real way to prevent littering of the streets, instead of singling out one indefinite type of handbill and absolutely prohibiting its distribution while permitting the streets to be littered by all other handbills.

(2)

Furthermore, petitioner's attempted separation of handbills into the classes of commercial advertising and non-commercial advertising is based upon unreality and is most impracticable. In the trial before the Circuit Court of Appeals, petitioner took the position that in the case of a handbill containing a combination of commercial and non-commercial data, if it is distributed primarily for commercial advertising purposes, it is to be treated as a commercial advertisement.

The unsatisfactory nature of such a test was forcefully pointed out by Judge Clark (R., 30-32) when he asked "How much is 'primarily'?" and showed that the net result of such a rule would be to make the police officers the arbiters, which would be most unfortunate. Respondent's handbill was used by Judge Clark as a good example of the uncertainty of the suggested distinction. If words were counted, more words are devoted to the protest than to the rest of the handbill; spacing and display give at least equal place to the protest. Suppose in the case of *Kim Young* v. *California*, supra, the speakers "Back from War-torn Spain" were being compensated out of the "Admission 25¢ and 50¢", would the financial remuneration they received make the meeting commercial? Actually the Superior Court characterized the circulars as commercial while petitioner urges they should be classified as non-commercial.

Why could not newspapers themselves be prohibited by a municipality if the officials in power did not like a paper's criticism? Certainly newspapers are primarily commercial enterprises and their owners operate them to make a profit. We mention these illustrations to indicate the extremely difficult problem which the courts would face of distinguishing between commercial and non-commercial circulars if it were held that commercial advertising handbills could be absolutely prohibited. Judge Brand referred to this question in *Loyear* v. *City of Portland*, supra, and said:

> "I pass without comment the profoundly difficult matter of distinguishing between commercial advertising and other forms of information and opinion, but it appears clear that in infinitely varying degrees commercial advertising may approach the dissemination of information of great social importance concerning discoveries, modern techniques and the like. To draw the line would involve a difficult and delicate judicial process."

Moreover, there is no constitutional justification for petitioner's classification of advertising into commercial and non-commercial advertising. The alleged distinction between so-called property rights and so-called personal rights is a superficial play on words. Property rights are not limited to inanimate matter, as land and chattels. The most sacred rights of merchant, mechanic, and farmer, of master and servant, are, when analyzed, personal rights of individuals and most of them relate to their interest in securing for themselves some form of property. This is well illustrated by the dissemination of information by employer and employees. The employee may publicize the unfairness of an employer under the aegis of free speech, but his purpose in doing so is to gain more property for himself. Yet no one calls the right to picket a property right. The same motive actuates the small business man. All that we ask for is that he have the right to advertise on a par with the employee, that he may secure the benefits of more business or even employment for himself. For the

courts to lay down a rule, through the power to define freedom of speech and press, so that one group has the inherent right to distribute leaflets on the street to persons willing to receive them, while another group is declared subject to unqualified prohibition at the option of any municipality or state, would, we submit, be a most unwise course.

We accordingly urge that no distinction should be made between so-called commercial advertising and non-commercial advertising.

POINT II

Section 318 of the Sanitary Code is invalid because it unreasonably prohibits the distribution of commercial handbills, whereas littering can be prevented by other and lawful means.

The avowed purpose of the handbill ordinance is to prevent the littering of public streets and sidewalks. We have no quarrel with that objective. The truth of the matter is that if the suggestion of this Court were followed by The City of New York and a handbill ordinance enacted which regulated the distribution of all handbills, there would not even be the littering which exists at the present time from the unrestrained distribution of all non-commercial handbills.

Petitioner has now dropped the suggestion he made before the District Court and the Circuit Court of Appeals that commercial advertising handbills were more apt to be cast away than non-commercial handbills (See Judge Clark's comment on this. R., 24, footnote 1). In *City of Milwaukee* v. *Kassen*, 203 Wis. 383, 385, 234 N. W. 352, 353, the court stated: "nor is it true that commercial advertising in the form of a dodger or handbill is more likely to be thrown to the street and result in its being littered than handbills or dodgers containing political or economic propaganda." Petitioner now admits (Petitioner's brief, p. 22) that non-commercial handbills are as obnoxious in

respect of littering the streets as are commercial handbills. But, he adds, the littering that results from non-commercial handbills is something that must be patiently borne by a municipality. A reading of this Court's recent handbill decisions would inform petitioner that he does not have to tolerate littering from any kind of handbills and we submit that the way to prevent littering is to regulate all handbills.

In *Lovell* v. *City of Griffin*, supra, Mr. Chief Justice Hughes intimated that an ordinance which prohibited the misuse or littering of the streets would be sustained. In *Schneider* v. *State*, supra, Mr. Justice Roberts pointed out the way that municipalities could prevent littering of the streets when he stated:

> "This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."

For a case which upheld as valid and reasonable a city ordinance which merely prohibited the *casting* of handbills to the street, see *City of Philadelphia* v. *Brabender*, 201 Pa. 574, 51 Atl. 374. A note in 29 Geo. L. J. 660, 662, commenting on Judge Hulbert's decision below and the recent handbill decisions of this Court, states that municipalities must now act directly upon those who throw handbills into the streets and in that way prevent littering.

A Municipal ordinance may of course prohibit literature of an obscene or immoral nature and literature that would tend to incite public disorder. It might also properly provide, we believe, that handbills distributed on the streets should be given only to those persons who willingly received them. Furthermore, we would have no quarrell with an ordinance which provided that the distribution of handbills on a public street must not result in a littering of the street and that if by chance handbills were cast away, the distributor must clean them up.

We concede, therefore, that a municipality may make reasonable regulations concerning the use of public streets, sidewalks and other public places. Dillon, Municipal Corporations (5th Ed.) sec. 589. Ordinances and regulations, however, which are discriminatory or unreasonable are invalid and accordingly whatever regulatory measure is adopted must be reasonable and not drafted in such a way as to make it impossible for the small business man to comply with it, because in that event it would merely be a subterfuge for an outright prohibitory ordinance. Furthermore, it is established law that the determination of what, in any specific instance, is a proper and reasonable exercise of the police power is within the province of the courts. *Lawton* v. *Steele*, 152 U. S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385.

It is submitted that the handbill regulation involved in the instant case is unconstitutional because it does not reasonably regulate the distribution of handbills but absolutely prohibits their distribution. Petitioner seems to fear that, to hold this handbill regulation invalid would result in New York City being flooded with handbills. Any such fear is, we believe, entirely groundless. This Court has suggested that an ordinance may prohibit the casting of handbills to the street, and New York City is well equipped with receptacles for waste paper so it would cause the public no unreasonable inconvenience to enforce such a provision. If the ordinance in addition prohibited the littering of the streets, and directed that circulars should be handed only to those persons who willingly receive them, and required the distributor of handbills to have someone present to pick up any that were cast away, it is submitted that the objective of the city to keep its streets clean would be accomplished, and accomplished in a constitutional manner.

In the instant case, respondent was absolutely prohibited from distributing handbill A. An examination of the handbill will show that it is a perfectly harmless circular and contained nothing of an obscene or immoral nature, nor is it incendiary so as to be apt to cause a public disorder. It is merely a spirited protest against the conduct of the Commissioner of Docks, and information about the submarine:

Respondent had planned to have someone with each person distributing handbill A to pick up any circulars cast away but he was not even given an opportunity to demonstrate that no littering would result and that the handbills would be handed only to those persons who willingly received them so that there would be no molestation of the public.

As the patched-up ordinance is now phrased, the handing of one card by one person to another person, willing to receive it, at 4 A. M. in the morning on a vacant street would be prohibited and the distributor would be liable to arrest and punishment. An ordinance so phrased is clearly unreasonable and unconstitutional and its enforcement should be enjoined. The conclusion reached by Judge Clark (R., 28) is, we submit, the correct one, namely: "Absolute prohibition of expression 'in the market place' is illegal, not to be saved by any commercial taint attached to the expression."

POINT III

Section 318 of the Sanitary Code is invalid in that it is discriminatory against the small business man and deprives respondent of property without due process of law.

The conduct of his business by respondent is a lawful enterprise and this Court has frequently held that it is beyond the police power of the states to interfere arbitrarily with a lawful business. *Meyer v. Nebraska*, 262 U. S. 390, 400 (1923); *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 111 (1928); *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589 (1897). Even the small business man has some rights and it is still the law of the land that

> "a regulation which has the effect of denying or unreasonably curtailing the common law right to engage in a lawful private business such as that under review cannot be upheld consistent with the 14th amendment. Under that amendment, nothing is

more clearly settled than that it is beyond the power of a state, under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable or unnecessary restrictions upon them."

New State Ice Co. v. *Liebmann* 285 U. S. 262, 278, 76 L. Ed. 747, 754;

J. Burns Baking Co. v. *Bryan*, 264 U. S. 504, 513, 68 L. Ed. 813, 826.

(1)

Under the language of the present patched-up regulation, only the business man is discriminated against. If a labor union organizer distributes handbills advertising a labor meeting, that is permitted—even though such organizer makes a living from such activity. Similarly, a candidate for office may under this regulation distribute handbills freely, advertising himself and his qualifications—even though the purpose of such advertising is to get a job from which he will receive his livelihood.

But, if, on the other hand, the business man, already unduly harassed from many sources, seeks to increase his sales by using a circular and thus provide employment to a few more people, he is liable to arrest and punishment under this regulation without regard to whether any littering results therefrom. It should be remembered, that the men who distribute handbills are entirely unskilled workmen and in most cases are not even capable of hard manual labor, so that this type of work is about all they are capable of doing. And while respondent, as a small business man, would only employ 8 or 10 men, if this is multiplied by the thousands of small business men throughout the United States, the number of persons who would be deprived of earning their own livlihood and staying off the relief rolls is substantial.

Petitioner seeks to establish the proposition that every person who desires may give information or opinion upon any social, political, economic, industrial or religious subject to any person on a public street and that

a picket standing before a store, which is involved in a labor dispute may, of constitutional right, deliver handbills requesting the public to refrain from trading with the store; but that if the proprietor stands besides the picket and delivers handbills to the public with a simple solicitation of patronage, such action is totally without the protection of the constitution and may be absolutely prohibited by a municipality. This Court should put an end to such unlawful discrimination.

In the same way the present ordinance discriminates in favor of sample copies of newspapers regularly sold. Such sample copies of newspapers would undoubtedly contain a mixture of purely commercial advertising and information and opinion. If respondent were to print a sample copy of a newspaper in which there was a combination of advertising of the submarine and general news, he would be prohibited from distributing it under this ordinance. The present handbill would, in fact, be quite analogous to such a sample newspaper, if respondent merely inserted the word "Editorial" at the head of his protest against the Dock Department. Such discrimination between what sample copies of newspapers may be distributed is also unreasonable and the ordinance is unconstitutional on this ground.

In *Ex Parte Johns*, 129 Tex. Cr. Rep. 487, 88 S. W. (2d) 709, for example, it was held that an ordinance which prohibited the distribution of advertising matter but exempted newspapers and political advertising was held unconstitutional as discriminatory and denying the equal protection of laws. The court stated:

> "In our opinion, the ordinance is discriminating in that it grants special privileges to those who scatter waste paper, wrapping paper, circulars and handbills carrying advertisements of a political nature, while it denies such privileges to those who by the same means and methods scatter nonpolitical advertisements equally harmless and inoffensive."

Judge Hulbert below in commenting on the discriminatory nature of the ordinance, stated (Petitioner's brief, ap-

pendix, pp. 47-48): "The ordinance is clearly discriminating against the business man while affording protection to persons, distributing non-commercial handbills, whose convictions and efforts might be subversive to the welfare of the government."

(2)

A further objection to the ordinance is that it constitutes a deprivation of respondent's property without due process of law.

This issue was litigated in *In Re Thornburg*, 55 Ohio App. 299, 9 N. E. (2d) 516 involving the Cleveland ordinance. Thornburg was arrested for handing out cards on the sidewalks advertising the pictures he snapped of persons. It was conceded that Thornburg was engaged in a lawful business and the issue was the validity of the ordinance absolutely prohibiting him from handing out the advertising cards. In holding the ordinance unconstitutional as a deprivation of plaintiff's property rights, the court said:

> "Since it is recognized that the right to engage in a lawful business is a property right and that it carries with it the right to appeal to the public for patronage, through bills, circulars, cards, or other advertising matter, it becomes quite apparent that to declare the distribution of such advertising matter, which is an incident of a lawful business, a nuisance as a matter of law, amounts to an infringement of the constitutional provision that the citizen shall not thereby unreasonably, arbitrarily, or without due process of law be deprived of his property."

Another case dealing with such ordinances from the point of view of a deprivation of property is *Cleveland Shopping News Co.* v. *City of Lorain*, 37 Ohio Law Rep. 537. In that case the plaintiff brought an action for an injunction against the City to restrain the enforcement of a city ordinance, prohibiting the circulation of any handbills advertising any commodity for sale. The plaintiff had an established advertising business for the circulation of handbills from

house and the city officials were threatening to arrest the circulators. In holding the ordinance unconstitutional, the court stated:

> "The authorities are clear that the right to conduct a lawful business is property and incident thereto is the right to appeal to the public for patronage;"

If there is a constitutional right to engage in business and personal service, then there must also be a constitutional right to do those things without which the doing of business is impossible. As Judge Brand stated in *Loyear* v. *City of Portland, supra*: "All men whose eyes are open to reality must know that advertising is an essential attribute of the constitutional right to acquire property. The constitutional right to sell one's personal services or goods, without any right to notify the public that goods or services are for sale, would be a mockery."

It should always be remembered that the small business men—the backbone of American business—cannot afford to advertise in newspapers and over the radio. Their only means of reaching the public is through circulars and if this medium is denied them, for no good reason, it will result in a substantial hardship to them. Pleas are being made daily to do something for small business, but New York City only makes their burdens greater.

Conclusion

In summation we submit that Section 318 of the Sanitary Code of The City of New York is invalid and unconstitutional because (1) it unlawfully discriminates between commercial and non-commercial advertising handbills; (2) it is an unreasonable regulation in that it unconditionally prohibits the distribution of all commercial advertising circulars, when littering of the streets can be prevented by other and lawful means; and (3) it is discriminatory against the small business man and constitutes a deprivation of property without due process of law.

Subsequent to 1938, an Oregon Court in *Loyear* v. *City of Portland, supra,* has held squarely in point that an ordinance which unconditionally prohibits the distribution of commercial advertising circulars is unconstitutional; a California Court in *People* v. *Taylor, supra,* held that an ordinance which absolutely prohibited the distribution of a handbill containing a combination of commercial advertising matter and political discussion was unconstitutional; and in the case at bar, Judge Hulbert and Judge Clark, while limiting their decisions to the facts of the case, namely, that the distribution of a handbill containing a combination of advertising and protest could not be suppressed, nevertheless, both made clear in their opinions that they felt that commercial advertising matter could only be regulated and not prohibited.

This, we submit, represents the new law since 1938 and the reasoning found in these opinions should be approved by this Court.

The decree of the Circuit Court of Appeals and of the District Court should be affirmed.

Dated: New York, N. Y. March 5, 1942.

Respectfully submitted,

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WINTHROP, STIMSON, PUTNAM & ROBERTS,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 707

LEWIS J. VALENTINE, individually and as Police Commissioner of The City of New York,
Petitioner,

Against

F. J. CHRESTENSEN.

BRIEF OF AMICUS CURIAE FOR THE MEMBER CITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

Filed by the Following Members of the Model Hand-bill Ordinance Committee:

HARRY E. WEINBERG,
City Attorney of Duluth, Minnesota, Chairman.

JEROME I. MYERS,
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SUBJECT INDEX

TABLE OF CASES AND STATUTES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 707

LEWIS J. VALENTINE, individually and as Police Commissioner of The City of New York,
Petitioner,

Against

F. J. CHRESTENSEN.

BRIEF OF AMICUS CURIAE FOR THE MEMBER CITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

STATEMENT

The NATIONAL INSTITUTE OF MUNICIPAL OFFICERS is an organization of cities acting through their chief legal officers. The title of this chief legal officer varies throughout the nation from Corporation Counsel to City Attorney, City Solicitor, Municipal Counselor, Director of Law, etc. In 1940 the President of the NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS appointed a Committee to draft a model handbill ordinance which would comply with the decisions of this court in the cases of *Lovell* v. *Griffin*, 303 U. S. 444 (1938) and *Schneider* v. *State*, 308 U. S. 147 (1939). It was believed that since this was a matter

affecting all cities a model ordinance incorporating the ideas and experience of a large number of city attorneys should be prepared. (One of the activities of the *National Institute* is the drafting of model ordinances on subjects of national interest to cities incorporating the most successful experience of all cities.)

In its 1940 report this Committee recommended a proposed model ordinance which, after consideration at the Annual Meeting of the NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, was referred back to the Committee for further study. See MUNICIPALITIES AND THE LAW IN ACTION FOR 1940, pages 187-205. In the 1941 report of this Committee it was stated in part as follows:

> "Until the questions with respect to regulation of handbill distribution raised in *Chrestensen* v. *Valentine,* 122 F. (2d) 511, decided July 25, 1941, by the Circuit Court of Appeals, Second Circuit, are determined by the Supreme Court of the United States, the Model Handbill Ordinance Committee of the NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS believes that it will serve no useful purpose to file at this time a detailed report dealing either with an exposition of the *Chrestensen* case or future plans of the Committee."

This Committee, therefore, comes here and files this brief in the hope of assisting the court in deciding the important questions in this case as those questions vitally affect the cities we represent. Since the briefs of the parties in this case will undoubtedly contain citation of all authorities in point, we will confine our brief to a summarized statement of the arguments which occur to us as a result of our study of handbill problems.

SUMMARY OF ARGUMENT

I. The right to distribute commercial handbills advertising one individual's business has never before been suggested as a part of the freedom of speech and freedom of the press guaranteed by the Federal Constitution.

II. City streets are constructed and maintained for the convenience and use of the public and no individual has an inherent right to use these streets for his personal business and his personal profit.

III. An impossible administrative task would be created for cities if thousands of commercial handbill advertisers can make public streets their personal place of business.

IV. If city officials can be allowed to distinguish between obscene and non-obscene handbills, they can make a decision as to whether a handbill is commercial or non-commercial.

ARGUMENT

POINT I

THE RIGHT TO DISTRIBUTE COMMERCIAL HANDBILLS ADVERTISING ONE INDIVIDUAL'S PERSONAL BUSINESS HAS NEVER BEFORE BEEN SUGGESTED AS A PART OF THE FREEDOM OF SPEECH AND FREEDOM OF THE PRESS GUARANTEED BY THE FEDERAL CONSTITUTION.

Until this case arose one cannot find a single opinion of this court referring to a claim that the right to dis-

tribute commercial handbills advertising one individual's personal business is a right protected by the constitutional guarantees against abridgement of freedom of speech and of the press. The question before this Court is therefore a novel one in which the appellee seeks to establish a new business right or "business privilege" to the free use of the streets for his personal commercial enterprise. Certainly if such a right could reasonably be said to be included in these constitutional protections the ever active minds of American businessmen would have established the "right" many years ago.

Freedom of speech, and of the press, guaranteed by the First Amendment to the Constitution of the United States of America, against abridgement by the Congress, and secured by the due process clause of the Fourteenth Amendment to citizens against infringement by the several States,—are fundamental personal rights which the citizen may enjoy and exercise free from such previous restraints upon speech and publication which had been practiced by other governments.

Nowhere throughout the classic struggle for freedom of speech, and freedom of the press,—a struggle bitterly waged between crown and commoner,—can a single instance be found in the books showing that a British subject ever laid claim to the right to take his stand in the "market place" and there distribute commercial handbills under the right of freedom of the press.

We, who subscribe our names to this brief and as friends of the Court, respectfully submit it on behalf of the member cities of NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, feel that we would be derelict in our duty to the Court and to the municipalities which make up the membership of the NA-

TIONAL INSTITUTE, if we failed to argue earnestly that there is a truly essential and fundamental constitutional difference between the historic pamphlet as symbolizing freedom of the press, on the one hand, and a mere commercial handbill as evidencing but another and newer method of attempting to use municipal highways for private business purposes, on the other hand.

As municipal counselors, we should, as indeed we do, cheerfully accept the view of the Court in *Schneider* v. *State of New Jersey*, 308 U. S. 147, and the three handbill cases decided at, and determined with the *Schneider* case,—that mere cleanliness of streets cannot—on that ground alone—support the police power of a municipality for the purpose of closing the historic "market place" to the classic pamphlet, which, throughout the British, as well as the American struggle for freedom of opinion, has played so heroic and profound a part in the development of lofty Anglo-American principles and institutions. But we, as municipal counselors, respectfully urge upon the Court that, in our humble opinion, there is no denial of freedom of expression or opinion in denying completely, or strictly regulating the use of public city streets to peddlers of handbills, "purely" commercial or hybrid, when the purpose of such handbills is to gain private profit from operating a garage or a beauty shop, a tavern or an outdoor barbecue, a boxing exhibition or a boat race, or the exhibition of an antiquated submarine.

POINT II

CITY STREETS ARE CONSTRUCTED AND MAINTAINED FOR THE CONVENIENCE AND USE OF THE PUBLIC AND NO INDIVIDUAL HAS AN INHERENT RIGHT TO USE THESE STREETS FOR HIS PERSONAL BUSINESS AND PERSONAL PROFIT.

It is a fundamental rule of law that no one has an inherent right to use the public streets for his personal commercial enterprises. No one, for example, has an inherent right to park his automobile on the public streets even in front of his own property. The streets are constructed and maintained for the convenience and use of the public. A city has no right to grant an individual the right to inconvenience the public by obstructing the public streets. Certainly one individual member of the public cannot be favored over all other members of the public by furnishing to this individual a "free rent" place to work in the city streets at the public's expense.

If the city can give a commercial handbill distributor the privilege of conducting his business in the public streets it must also let any other person conduct any other similar business the individual decides upon in the public streets. Why pay for expensive newspaper and billboard advertising when all one has to do is print up a thousand or so cheap handbills and hire a few persons to hand them out on the streets and sidewalks at places where the most people go by? To have a billboard one must secure a place on private property and pay rent therefor, as it is well settled no one has a right to hang up a billboard on or over a public street. To use newspaper advertising one must pay for the higher

expense in printing news to go along with the advertisement and the more expensive method of distribution by sale.

We do have public utilities using the public streets in a business conducted in the public interest, convenience and necessity. Surely it is not to the interest of the public that John Jones be given the right to use the public streets to hand out 50,000 handbills advertising his personal fire sale or his personal submarine. This is no convenience to the public, but purely and simply a profit scheme for John Jones. As for public necessity, there is no imagination so strong as to suggest that there is any public necessity back of commercial handbill distribution. It would seem that the public interest and convenience would best be served by keeping the streets for public use strictly, rather than allowing individuals to make the streets their personal place of business.

It seems reasonable to assume that if the principle is ever established that anyone can hand out commercial handbills on the public streets a new business will immediately be created. Printers will canvass stores, take orders for cheap commercial handbills by the thousands, and have their employees hand out the handbills, thus rendering a complete "commercial handbill service." These printers will thus be receiving a "free rent" place to carry on their business with the public paying the cleaning costs.

POINT III

AN IMPOSSIBLE ADMINISTRATIVE TASK WOULD BE CREATED FOR CITIES IF THOUSANDS OF COMMERCIAL HANDBILL ADVERTISERS CAN MAKE PUBLIC STREETS THEIR PERSONAL PLACE OF BUSINESS.

It must be apparent to all that the reaction of most persons to a commercial handbill is to throw it away either after or before reading its contents. If commercial handbill advertisers can use the public streets to ply their trade, it seems indisputable that thousands of these handbills will be thrown away to land on the streets, to pile up in and clog gutters, sidewalks, and adjoining property. Who must clean up this dirty mess? The handbill distributor? No, there is no way a city can force him to clean up his "place of business" when that "place of business" is a public street, for he would not have the equipment or the experience to carry on cleaning operations on a busy street and the city sanitation department is the only agency which can really do the job correctly. The city must do the cleaning at public expense or allow an unsanitary, unhealthy, condition to exist. The commercial handbill distributor can hand out his handbills and go home. Other business places like butcher shops for example, must pay rent and keep their shops clean in order to keep their business and to avoid violation of health regulations.

The *Schneider* decision *supra* holds that this cleaning and sanitary problem cannot be allowed to override the right to advocate a cause through a pamphlet. If *Chrestensen* prevails in this case the cleaning burdens of cities will be magnified a thousand-fold, and a free place of business will have been given to him and others in the name of freedom of the press and speech. If

Chrestensen can bring the business of distributing commercial handbills within the protection of the constitutional provisions against abridgement of the freedom of the press and speech, the next claim will be that any license or other regulatory measure to make him pay the cost of his use of the streets is prohibited by these same constitutional provisions.

If placing commercial handbill distribution upon the same dignity with non-commercial handbills can, by any stretch of imagination, give added dignity and sacredness to the freedom of the press, which it now happily enjoys in our nation, despite grim and desperate dangers which face the nation,—if commercial handbills can work such transmutation,—then we, as municipal counselors, will of necessity be forced to accept such new body of doctrine created by the alchemy of commercial profit.

Shall the public streets of our cities become spotted with peddlers, and strewn, hour by hours, day by day, month by month, throughout the year, with all sizes, colors and shapes of commercial handbills advertising any one of hundreds of articles necessary, or thought to be necessary to the comfort and enjoyment of daily life—shall all this come to pass in the name of freedom of the press? Has it ever been the rule of this Court, or has it ever been the commonly accepted sense of the American people, that a commercial handbill, distributed to increase the volume of private business, is entitled to equal recognition, in a constitutional sense, with a non-commercial handbill solely devoted to expression of opinion?

It is a well known trait of human nature that not so many of us will print up pamphlets to advocate a cause, but all of us will and do spend money to further our personal business and to increase its profits. It there-

fore seems reasonable to assume that the cleaning burden of cities would indeed be magnified a thousandfold if commercial handbills are accorded the same privileged status as the non-commercial pamphlet.

POINT IV

IF CITY OFFICIALS CAN BE ALLOWED TO DISTINGUISH BETWEEN OBSCENE AND NON-OBSCENE HANDBILLS, THEY CAN MAKE A DECISION AS TO WHETHER OR NOT A HANDBILL IS COMMERCIAL OR NON-COMMERCIAL.

It may be suggested that this particular hybrid type of handbill must be allowed or someone must pass upon whether or not it is a commercial advertisement and commercial use of the streets or a bona fide attack on city officials. We feel certain the facts, as stipulated in this case, clearly indicate that the particular handbill now before the court is purely and simply a commercial advertisement coupled with an attempt to subvert the principles of freedom of speech and freedom of the press to the personal individual gain of the submarine owner. Certainly it would not be contended that no city official can decide whether or not a particular pamphlet contains obscene matter. This being so, the mere fact that a city official must make a decision as to whether or not a particular pamphlet is primarily commercial, or primarily non-commercial, should not, in itself, invalidate an ordinance.

We do not want to be understood as saying that the mere fact that a pamphlet contains an advertisement of a meeting to which an admission is charged makes it a commercial handbill. Undoubtedly there will be cases where it will be hard to draw the line, but, if city officers are unreasonable in their decisions, the courts are always open to correct them.

CONCLUSION

We respectfully submit that distribution of commercial handbills on the public streets—and this case involves such a handbill—should be subject to regulation or prohibition by cities acting under their police powers to preserve to the public the unobstructed and unfettered use of the streets to which it is entitled.

Respectfully Submitted By The

Members of the Model Handbill Ordinance Committee on behalf of the Member Cities of the NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS:

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FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1941

No. 707.

LEWIS J. VALENTINE, individually, and as Police Commissioner of the City of New York,
Petitioner,

against

F. J. CHRESTENSEN,
Respondent.

BRIEF OF NEW YORK CITY COMMITTEE OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

NEW YORK CITY COMMITTEE OF THE
AMERICAN CIVIL LIBERTIES UNION
as Amicus Curiae

OSMOND K. FRAENKEL
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BRIEF OF NEW YORK CITY COMMITTEE OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

The New York City Committee of the American Civil Liberties Union is interested in this case because it believes that it presents to this Court an important phase of the problem of the constitutional power of municipalities to restrict the distribution of leaflets. This problem, while an old one in this country, has received new attention in recent years in part because of the activities of the sect of Jehovah's Witnesses, in part because of increased labor activities. This case, however, presents neither of these types of activities but arises because of the desire of a single individual to show to the public, for a small fee, a submarine owned by him, and to distribute leaflets calling attention to it.

The ordinance which must here be considered is of the prohibitory type, such as was considered by this Court in three of the four cases generally known as *Schneider* v. *Irvington*, 308 U. S. 147. It presents no questions of licensing and regulation, such as was involved in *Lovell* v. *Griffin*, 303 U. S. 444, and the fourth of the group of cases which gave its title to the *Schneider* case. Nor does it involve any question of licensing and taxation, such as was involved in the case of *Jones* v. *Opelika*, recently dismissed by this Court for want of a final judgment.

Here the ordinance, Sanitary Code of the City of New York, §318, is almost identical in language with the various restrictive ordinances considered in the *Schneider* case, but for the fact that it is by its terms limited to "commercial and business advertising matter" (R. 4).

While respondent contends, and the majority of the Circuit Court agreed with him (R. 29-32), that the leaflet here in question may not properly be described as commercial, because of the fact that it was accompanied by a protest against certain actions of the police, we shall, for the purposes of this brief, assume that the leaflet must, as was held by Judge Frank in dissent (R. 34-35), be tested by standards applicable to leaflets which are commercial only. We adopt that position largely because we believe that it is impossible to make a philosophically sound distinction between commercial and non-commercial handbills. Thus, as the majority of the Circuit Court of Appeals pointed out, the Los Angeles handbill considered in the *Schneider* case had been considered by the State Court as commercial (R. 26). Yet this Court, while quoting that observation without comment (308 U. S. 155 n. 3), held the ordinance invalid as applied to that particular handbill. It is true that it has been suggested (see R. 29) that this handbill might have been denominated non-commercial on the theory that, although calling attention to a meeting at which admission was to be charged, it called attention to a meeting dealing with a non-commercial enterprise.

We do not believe that any distinction can validly be made on a ground so tenuous and difficult of application. If lines are to be drawn we submit that the basis of the distinction should be, not whether the matter distributed attracts attention to an article of commerce, but whether it is itself such an article or is a means of conveying information and opinion. For while the First Amendment is not designed to protect the sale of merchandise, we believe it covers all dissemination of "information or opinion" (as was said by Mr. Justice Roberts in the *Schneider* case). And information and opinion can relate to articles of commerce as well as to political or philosophical concepts.

It is significant that in the *Schneider* case Mr. Justice Roberts more than once repeated the phrase above quoted. He said:

> "Although a municipality may enact regulations in the interest of public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate *information or opinion.* - - -
>
> So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to *impart information* through speech or the distribution of literature, it may lawfully regulate the conduct of those using streets. - - -
>
> Prohibition of such conduct would not abridge the constitutional liberty, since such activity bears no necessary relationship to the freedom to speak, write, print or distribute *information or opinion.* - - - -
>
> As we have pointed out, the public convenience in respect of the cleanliness of the streets, does not justify an exertion of the police power which invades the free communication of *information and opinion* secured by the Constitution. * * * But, as we have said,

the streets are natural and proper places for the dissemination of *information and opinion*. - - -

While it affects others, the Irvington ordinance drawn in question in No. 11, as construed below, affects all those who, like the petitioner, desire to impart *information and opinion* to citizens at their homes."

Finally, he pointed out the invalidity of an ordinance which gave a municipality the right to say that

> "some persons may, while others may not, disseminate *information* from house to house" (italics ours).

It is significant that the only reference in the entire opinion to commercial matters was at the very end, in discussing the Irvington ordinance, when the Court said:

> "We are not to be taken as holding that commercial solicitation and canvassing may not be subjected to such regulation as the ordinance requires."

There it should be remembered, however, the ordinance was not a prohibitory one but a regulatory one. Moreover, it regulated not activities on the streets, but canvassing from house to house.

We believe that a fair reading of that opinion inevitably compels the conclusion that this Court, in voiding ordinances absolutely banning the use of leaflets on the public streets, did not intend to restrict its decision to leaflets calling attention to ideas and except from the operation of the decision leaflets calling attention to material things. The public interest is served in the latter as in the former case.

In the case at bar the leaflet sought to call to the public's attention a submarine which was on exhibition (R. 18a and b). For this plaintiff made a small charge (R. 18c). While it was undoubtedly the purpose of respondent in

exhibiting the submarine to make some money, the exhibit itself clearly had an educational and informative value for the public. If the distribution of a leaflet advertising this exhibit can be banned on the ground that it is commercial in character, then, with equal logic, a leaflet could be banned which announced the holding of a lecture on some literary or artistic subject at which an admission fee was to be charged. For in such case it would be reasonable to suppose that the management of the lecture expected to make some money out of it. Indeed the lecture platform has been an ancient method by which men well known in various fields have made large sums of money. We do not believe that the fact that lectures consist of spoken words, whereas the object of the leaflet here was to call attention to a material object, should make any difference whatever in the right of a municipality to forbid distribution of the leaflet.

We submit, moreover, that in the field of commerce, as in the field of ideas, it is important for the person of small means to be able to reach the public. Just as in the field of ideas there are many people who cannot command the ordinary media of expression, such as the newspaper, periodical or radio, either because of the unpopularity of their ideas or because of the expense involved, so there are many people who cannot use the ordinary methods of advertising to call attention to their products. Thus in a community in which a monopoly was seeking to entrench itself, it might be impossible for the independent producer or merchant to call attention to his wares by recourse to the local press, which often is controlled by the same monopoly. His only means of calling attention to his merchandise would be by the distribution of leaflets on the public streets. And in sections of a large city where there are no neighborhood newspapers the local merchant may also find it necessary to have recourse to leaflet distribution. The public gains by such activities because its attention is called to varying opportunities.

Of course, we do not mean to suggest that a municipality may in no event regulate leaflet distribution. Clearly it can prevent interference with traffic by persons who congregate at crowded places. It probably can regulate the use of any particular place on the streets as was done in *Commonwealth* v. *Pasconc*, 1941 Mass. Adv. 713, cert. denied 314 U. S. . Presumably also, the municipality can protect itself against street littering by punishing not only the person who actually throws the leaflet away, as was suggested in the *Schneider* case, but also by punishing the distributor if he presses his leaflets upon unwilling receivers. However, there is no such problem involved in the case at bar (see R. 5).

There remains to be considered the argument advanced by Judge Frank in dissent (R. 47) that the various billboard cases, such as *Fifth Avenue Coach Company* v. *New York City*, 221 N. Y. 467 and *Packer Corporation* v. *Utah*, 285 U. S. 105*, recognized the right of a state to forbid certain types of communication of information with regard to commercial products. However, those cases rested on entirely different considerations. The principal argument advanced in both of them was the equal protection clause. While counsel in each case made an argument based on the due process clause of the Fourteenth Amendment no contention was advanced that the advertisement there in question was a form of freedom of the press. Moreover, had such argument been advanced the special facts of those cases would have prevented the application of the principle here contended for.

In the *Fifth Avenue Coach* case, the decision rested in large part upon the fact that the municipality had the right to prohibit exterior advertising on buses and other vehicles because of the effect of such advertising upon traffic congestion. And the *Packer Corporation* case rested

*See also *Cusack Co.* v. *Chicago*, 242 U. S. 526; *St. Louis Poster Adv. Co.* v. *St. Louis*, 249 U. S. 269.

upon the effect of billboard advertisements of tobacco upon minors who were, by the state, denied the right to use tobacco. Moreover, it may well be that this Court would now accept the contention that a community can ban outdoor advertising merely because it offends the eye.* Such a restriction is not comparable with a complete prohibition of any use of the streets for the distribution of advertising leaflets.

It is, therefore, respectfully submitted that the judgment under review be affirmed.

Respectfully submitted,

NEW YORK CITY COMMITTEE OF THE
AMERICAN CIVIL LIBERTIES UNION
as Amicus Curiae

OSMOND K. FRAENKEL
Of Counsel

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*See *General Outdoor Adv. Co.* v. *Department of Public Works*, 289 Mass. 149, 184-87; Gardner, *The Massachusetts Billboard Decision*, 49 Harv. L. R. 869.

SUPREME COURT OF THE UNITED STATES.

707.—October Term, 1941.

Lewis J. Valentine, individually and as Police Commissioner of the City of New York, Petitioner, *vs.* F. J. Chrestensen.	On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 13, 1942.]

Mr. Justice Roberts delivered the opinion of the Court.

The respondent, a citizen of Florida, owns a former United States Navy submarine which he exhibits for profit. In 1940 he brought it to New York City and moored it at a State pier in the East River. He prepared and printed a handbill advertising the boat and soliciting visitors for a stated admission fee. On his attempting to distribute the bill in the city streets, he was advised by the petitioner, as Police Commissioner, that this activity would violate § 318 of the Sanitary Code which forbids distribution in the streets of commercial and business advertising matter,[1] but was told that he might freely distribute handbills solely devoted to "information or a public protest."

Respondent thereupon prepared and showed to the petitioner, in proof form, a double-faced handbill. On one side was a revision of the original, altered by the removal of the statement as to admission fee but consisting only of commercial advertising. On the other side was a protest against the action of the City Dock Department in refusing the respondent wharfage facilities at a city

[1] "*Handbills, cards and circulars.*—No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letterbox therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter."

pier for the exhibition of his submarine, but no commercial advertising. The Police Department advised that distribution of a bill containing only the protest would not violate § 318, and would not be restrained, but that distribution of the double-faced bill was prohibited. The respondent, nevertheless, proceeded with the printing of his proposed bill and started to distribute it. He was restrained by the police.

Respondent then brought this suit to enjoin the petitioner from interfering with the distribution. In his complaint he alleged diversity of citizenship; an amount in controversy in excess of $3,000; the acts and threats of the petitioner under the purported authority of § 318; asserted a consequent violation of § 1 of the Fourteenth Amendment of the Constitution; and prayed an injunction. The District Court granted an interlocutory injunction,[2] and after trial on a stipulation from which the facts appear as above recited, granted a permanent injunction. The Circuit Court of Appeals, by a divided court, affirmed.[3]

The question is whether the application of the ordinance to the respondent's activity was, in the circumstances, an unconstitutional abridgement of the freedom of the press and of speech.

1. This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets

[2] 34 F. Supp. 596.
[3] 122 F. 2d 511.

of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct.

2. The respondent contends that, in truth, he was engaged in the dissemination of matter proper for public information, none the less so because there was inextricably attached to the medium of such dissemination commercial advertising matter. The court below appears to have taken this view since it adverts to the difficulty of apportioning, in a given case, the contents of the communication as between what is of public interest and what is for private profit. We need not indulge nice appraisal based upon subtle distinctions in the present instance nor assume possible cases not now presented. It is enough for the present purpose that the stipulated facts justify the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance. If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command.

The decree is reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.